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Office of the Chairman
Administrative Conference of the United States

Administrative Conference of the United States

Recommendations and Reports

1993

Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished by direct action on the part of the affected agencies or through legislative changes.

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Recommendation 93-1

Use of APA Formal Procedures in Civil Money Penalty Proceedings

Since 1972, the Administrative Conference has been encouraging the use of administratively-imposed civil money penalties as an enforcement tool. In Recommendation 72-6, the Conference recommended that Congress provide for such remedies, to be imposed after a hearing (usually presided over by an administrative law judge) pursuant to the Administrative Procedure Act's provisions in sections 554, 556, and 557, which govern formal adjudications. Congress has followed that recommendation in hundreds of contexts over the past 20 years, and administrative civil money penalties have become a frequent enforcement mechanism.

Congress has, however, in several recent environmental statutes, authorized the Environmental Protection Agency to impose civil money penalties without a formal APA hearing, without an ALJ, and without de novo judicial review. The Army Corps of Engineers and the United States Coast Guard have been granted similar authority. The amounts of potential liability under these statutory provisions vary from maximums of $5,000 up to as high as $125,000. The issue is whether this trend is a good one.

The Administrative Conference has made a number of recommendations that relate to this topic. In its first recommendation on this subject, Recommendation 72-6, "Civil Money Penalties as a Sanction," the Conference recommended that systems for administrative imposition of civil money penalties should provide for adjudications on the record after a formal hearing pursuant to the APA. It reiterated that position in Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties."

In Recommendation 92-7, "The Federal Administrative Judiciary," the Conference considered the issue from a different perspective. In that recommendation, the Conference addressed the proliferation of non-ALJ adjudicators in agency proceedings, and encouraged Congress to return to a more consistent use of ALJs in the types of cases for which their use is most appropriate, so that the uniformity of process and decisionmaker characteristics that the APA envisioned could be reestablished. In proposals that presumed the implementation of recommended changes in the ALJ selection process and mode of performance review, the Conference suggested a set of guidelines that

Congress should use in determining when ALJs should be required as presiding officers.[1]

Among the types of cases cited by Recommendation 92-7 in which Congress should consider requiring ALJ hearings are those involving the "imposition of sanctions with substantial economic effect." While this is but one factor Congress is urged to take into account, it would appear to weigh strongly in favor of APA-ALJ proceedings in civil money penalty cases of the type at issue here. While the economic impact of a civil money penalty will vary depending on the respondent's resources, it can reasonably be assumed that a penalty of $25,000 would be substantial to most respondents, and even smaller penalty amounts might be substantial in many situations.

The interest in uniformity also weighs very much in favor of using APA-ALJ hearings in civil money penalty cases. Most administratively-imposed civil money penalty statutes do in fact require APA-ALJ hearings. There does not appear to be anything particularly unusual about the cases engendered by the programs under study that would warrant a different type of hearing. As a matter of good policy, anyone facing a civil money penalty imposed by a federal administrative agency with judicial review on the record of the administrative proceedings should have available the opportunity to have his or her case heard by an ALJ in a formal APA hearing. Where penalties would be small, it is of course less likely that such an opportunity would be taken; where they are large, such an opportunity becomes that much more important.

While neither an APA hearing nor an ALJ as presider may be constitutionally required, there may well be situations where due process would require something very much like an APA-ALJ hearing. An advantage of uniformly requiring the opportunity for ALJ hearings in civil money penalty proceedings is that it alleviates the uncertainty that arises from trying to apply the standards of *Mathews v. Eldridge*[2] in a variety of contexts. That case, which requires a balancing of three different interests in determining what process is due in a particular situation, provides no clear guideposts. Its requirements can only be determined definitively on post-hoc review. In contrast, the validity of the APA's formal adjudication process is well-established.

The Conference is therefore recommending that, in all cases involving administratively-imposed civil money penalties, the opportunity for a formal adjudication pursuant to the APA's provisions, 5 USC §§554, 556-558, be available to parties.[3]

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[1] Non-ALJs can, of course, be used by agencies for adjudications not stipulated by Congress to be within the coverage of sections 554, 556, and 557 ("non-APA adjudications"), or in APA adjudications where Congress has specially designated a presiding board or non-ALJ adjudicator. *See* 5 USC §556(b). Recommendation 92-7 was intended to address both types of congressional actions.

[2] 424 U.S. 319 (1976).

Recognizing the current existence of civil money penalty programs where the hearing officers are not protected by the APA's separation-of-functions provisions in section 554(d), the Conference is recommending that agencies with such programs provide for this important protection by regulation. Agencies should ensure that non-ALJ presiding officers and presiding officers in non-APA hearings will not report to, be evaluated by, or consult with prosecuting or investigating officials.[4]

Although the Conference originally recommended use of administrative hearings in civil money penalty cases because of the comparative cumbersomeness and expense of federal district court trials, concerns have been raised that APA-ALJ hearings can also be too slow, expensive and cumbersome, and that some cases should therefore not be required to be adjudicated under the APA. This concern, which extends beyond civil money penalty cases, can, however, be addressed within the ambit of the APA.

The APA provides flexibility with respect to procedures used in formal proceedings. Although sections 554, 556-558 contain certain basic requirements (such as proper notice, opportunity to present evidence and rebuttal, at least limited cross-examination, and the chance to submit proposed findings or exceptions), the APA leaves to agency discretion or other statutory provision such issues as the scope of discovery, the existence of time limits, and many evidentiary issues. Agencies should take advantage of such flexibility to issue rules that would encourage expeditious resolutions in ALJ proceedings.[5] For example, agencies could authorize (or require) limitations on discovery or the number of pages filed, or could set deadlines for the various stages of the proceeding, including the amount of time to issue a decision. They could also encourage the use of alternative dispute resolution in appropriate cases.[6] Thus, the uniformity provided by the APA does not and should not limit agency or ALJ flexibility in handling civil penalty cases expeditiously and fairly.

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[3] The recommendation that the opportunity for a hearing be afforded is intended to retain flexibility for resolving the case prior to an ALJ hearing, through settlement, alternative dispute resolution processes, or other processes agreed upon by the parties.

[4] As reflected in Recommendation 92-7, "The Federal Administrative Judiciary," the Conference also recognizes that there may be infrequent situations where Congress may wish to specially designate presiding officers with technical or other specialized expertise for APA formal adjudications in civil money penalty programs. *See* section 556(b) of Title 5. In these situations, the APA mandates a separation of functions.

[5] See, e.g., Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR §305.86-7 (1992).

[6] *See* Pub. L. No. 101-552, the Administrative Dispute Resolution Act, which amends the APA to provide authorization to use alternative dispute resolution processes. *See also* Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution," 1 CFR §305.86-3 (1992).

RECOMMENDATION

1. Congress should provide that the Administrative Procedure Act's formal adjudication provisions (5 USC §§554, 556-558) are available to parties whenever money penalties may be imposed by administrative agencies.

2. Agencies should ensure in their regulations that non-administrative law judge presiding officers in civil money penalty adjudication proceedings not covered by the APA's formal adjudication provisions are protected from undue influence. Specifically, such officers should not report to, be evaluated by, or consult on an ex parte basis with, prosecuting or investigative officials.[7]

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[7] Recommendation 2 is intended to assure that separation-of-functions protections are included within existing programs. These very important protections would be required by Congress in future programs by Recommendation 1, which urges that all of the APA's adjudication safeguards be made available in new civil money penalty programs. It is unlikely that Congress would consider a civil money penalty adjudication proposal for which it would not be in the public interest to make available the full range of APA safeguards. However, should that unlikely event occur, it is strongly urged that Congress assure that at least separation-of-functions protections of the type described in Recommendation 2 be incorporated in any such program.

Recommendation 93-2

Administrative and Judicial Review of Prompt Corrective Action Decisions by the Federal Banking Regulators

In the wake of the recent crises in the banking industry, Congress has passed two major statutes affecting the relationship among the four principal banking regulators (the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision) and the industries they supervise.[1] In 1989, the Financial Institutions Reform, Recovery and Enforcement Act gave the banking agencies extensive new enforcement powers. The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) went further, authorizing the federal banking agencies to take "prompt corrective action to resolve the problems of federally insured depository institutions," and to do so "at the least possible long-term loss to the deposit insurance fund." 12 USC §1831o(a)(1) and (2). Underlying the FDICIA scheme is Congress' belief that by acting quickly at the earliest sign of problems, the banking agencies may be able to prevent the failure or further deterioration of regulated institutions.

FDICIA added a new section 38 to the Federal Deposit Insurance Act, which requires banking regulators to take prompt corrective action (PCA) to preempt the possibility that a bank or savings association will fail or, if failure appears likely, to seize the bank early enough to ensure that there remain assets within the institution sufficient to cover its liabilities. The PCA framework is premised on a "tripwire" approach, under which banking regulators may take increasingly severe action, on a stage-by-stage basis, against a depository institution as the capital and soundness of the institution decline. FDICIA creates a system of five capital classifications, ranging from well capitalized to critically undercapitalized, within which bank regulators place institutions based on the application of capital standards. Downgrading of an institution's capital classification not only subjects it to increasing intervention by regulators, but also automatically triggers certain restrictions on the institution's activities (e.g., loss of authority to accept brokered deposits or to make payments on subordinated debt). In addition to considering capital standards, regulators may reclassify the institution based on a determination that it is in an unsafe or unsound condition or is engaging in an unsafe or unsound practice.

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[1] The Board of Governors of the Federal Reserve System is an independent federal agency with primary federal responsibility for the regulation of all bank holding companies, state-chartered banks that are members of the Federal Reserve System, and foreign banks. The Federal Deposit Insurance Corporation, also an independent federal agency, administers the Bank Insurance Fund for commercial banks and the Savings Association Insurance Fund for savings and loans, has primary federal responsibility for the regulation of all state-chartered federally insured banks that are not members of the Federal Reserve System, and has secondary regulatory authority over all other federally insured banks and thrifts. The Office of the Comptroller of the Currency, located within the Treasury Department, charters and supervises all national banks. The Office of Thrift Supervision, also located within the Treasury Department, charters all federally chartered savings and loans and supervises all savings and loan holding companies and federally insured savings associations.

Before passage of FDICIA, the banking agencies took coercive action through the formal enforcement provisions of section 8 of the Federal Deposit Insurance Act, which provides extensive procedural protections. The new section 38, on the other hand, accommodates the need for banking agencies to respond quickly to developing problems by permitting exercise of functionally similar powers outside the formal procedural framework of section 8. Moreover, although FDICIA dramatically increased the importance of capital classifications, and the standards on which they are based, in the regulatory scheme, the bank examination process in which these determinations are made is very informal, with limited opportunity for review. Specifically, while section 38 makes provision for limited procedural protection for an individual who is dismissed from office as a result of a PCA directive, as well as for an institution subject to a determination that it is in an unsafe or unsound condition, it does not provide for administrative review of PCA decisions, nor does it expressly provide for—or preclude—judicial review of PCA determinations.

The Administrative Conference believes that, in light of the significance of prompt corrective actions, greater procedural protection is appropriate. On the other hand, since time will often be of the essence in meeting FDICIA's goals of avoiding bank failures and minimizing the drain on the bank insurance funds, any procedural requirements must permit expeditious action and must be limited to those situations where agency actions have the severest impact. Moreover, any scheme for expanded review of PCA decisions must take into account the broad discretion Congress has afforded the banking agencies in determining and applying standards in this area.

The Conference believes that administrative review should be available for decisions that have an adverse effect on an institution's capital classification. These decisions, which are ordinarily made in the context of a bank examination rather than in a PCA directive, form the basis for any PCA action that may be taken against an institution. The highly informal and discretionary mechanisms for review of examination decisions that are currently provided by the banking agencies were designed for use in an atmosphere of trust and close working relationships between bankers and examiners. In the current environment, a somewhat more structured administrative review by a higher-level reviewing authority within the agency would promote fairness and more consistent results.

Providing a more effective administrative review mechanism is particularly important here where, because of the broad discretion afforded agencies to interpret fairly general statutory standards and the subjective nature of some of the determinations that must be made in the examination process, judicial review may be of limited effectiveness. Moreover, the proposed review process would provide a more meaningful record for judicial review in those cases where it can be effective. Paragraph 1 of this recommendation proposes a uniform, record-creating appeal process for decisions by all federal banking agencies in which an institution's capital classification is determined or changed. The banking agencies' rules should make clear whether changes in capital classification will ordinarily go into effect while administrative review is pending or will not become final until after administrative review; in either case, agency rules should provide for exceptions from ordinary practice in appropriate circumstances.

In addition, judicial review should be available for some of the most crucial PCA decisions. Institutions that have suffered adverse capital classifications and persons who have been dismissed as a result of PCA directives should be able to seek judicial review of those decisions, and the provisions governing judicial review in these cases should be made uniform across all the relevant federal banking agencies.

Similarly, any action to appoint a conservator or receiver for an institution should be judicially reviewable. Some such actions are already reviewable under existing law, though section 38 may be interpreted to preclude such review. Congress should clarify that review is available for all such decisions made by every federal banking agency and should provide for uniform standards of review and time limits for review of these decisions. The Conference recognizes the need for flexibility in determining whether an adverse capital classification or prompt corrective action decision should take effect pending judicial review and concludes that stays of agency action should be discretionary rather than automatic.

RECOMMENDATION

I. Administrative Appeals of Classification Decisions

A. In formulating an appeal process for independent internal review of classification decisions, the federal banking agencies should promulgate rules providing for an appeal to a senior official by a depository institution of a decision of an examiner or regional director that results in an adverse capital classification of the institution (including a decision to assign the institution a less-than-satisfactory rating for asset quality, management, earnings, or liquidity).

B. The appeal procedures should provide that:

(1) the affected institution is given immediate notice of its right to appeal;

(2) the institution is provided with a written report stating the reasons, including the factual bases, for the adverse classification or rating;

(3) the institution has an opportunity to supply further facts and information, make written representations, and, in the agency's discretion, present oral testimony and argument; and

(4) the agency's final decision is issued within a specified time.

C. The agencies also should specify in their rules whether or not an adverse capital classification decision will ordinarily be stayed pending completion of the internal appeal process and, in either event, provide for exceptions where special circumstances justify departure from regular practice.

II. Judicial Review of Final Agency Decisions[2]

A. Congress should amend Section 38 of the Federal Deposit Insurance Act, 12 USC §1831o, to permit a depository institution that has suffered an adverse capital classification, or a person who has been dismissed pursuant to section 38(n) of the Act, 12 USC §1831o(n), to seek judicial review of the federal banking agency's final decision in a federal district court.

(1) A party affected by an adverse capital classification should be required to seek review within ten days of receiving notice of the agency's final decision.

(2) The court should review the agency's decision under the standards of judicial review set forth in 5 USC §706.

(3) Whether the agency's ruling is stayed pending judicial review should be determined by the court under the usual standards for granting stays.

B. Congress should amend Section 38 of the Federal Deposit Insurance Act, 12 USC §1831o, to clarify that it does not preclude judicial review of decisions to appoint a conservator or receiver under the terms of section 38(h)(3), 12 USC §1831o(h)(3).

(1) In addition, Congress should amend Section 2 of the National Bank Receivership Act, 12 USC §191, to provide for judicial review of decisions to appoint receivers for national banks, and Section 11(p) of the Federal Reserve Act, 12 USC §248(p), to provide for judicial review of decisions by the Board of Governors of the Federal Reserve System to appoint conservators and receivers for state member banks.

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[2] In making these recommendations related to judicial review of decisions by federal banking agencies, the Administrative Conference takes no position on whether and to what extent judicial review of these decisions is available under current law.

(2) Congress should also amend the provisions relating to judicial review of decisions by all the federal banking agencies to appoint conservators and receivers so as to provide for:

(a) a consistent standard of review in accordance with 5 USC §706; and

(b) consistent time limits within which judicial review must be sought after a conservator or receiver has been appointed.

Recommendation 93-3

Peer Review in the Award of Discretionary Grants

Governments in most industrialized nations now play a prominent role in assembling and sustaining a sound scientific and engineering infrastructure and in providing financial support for artistic and other endeavors. Although many procedural vehicles exist for making the difficult scientific and artistic judgments that necessarily arise in apportioning limited resources, the United States government has depended to a large degree upon "peer review" systems in which the agency decisionmaker assembles a group of experts for advice.

Under this peer review model, the government does not attempt to persuade researchers to undertake particular research or artists to create particular kinds of art. Instead, a grantmaking agency allocates sums of money to broad fields of endeavor and invites researchers, artists, or performers to develop creative proposals for projects. A group of "peers" with expertise in the relevant area then evaluates and ranks proposals, leaving the ultimate funding decisions up to the governmental program officials. Peer review is intended to ensure that public funds are awarded objectively to meritorious scientists, artists, eleemosynary institutions, and, increasingly, for-profit entities in a way that renders the system accountable to the public and its elected representatives.

While peer review has proved remarkably durable in the 30 to 40 years during which federal agencies have employed it, the process has not been without controversy. Some critics suggest that peer review is an expensive waste of time; that it diverts creative minds from productive research to writing, reviewing, and discussing proposals; that it rewards huckstering skills at the expense of solid research; that it is sometimes abused by reviewers who breach confidentiality; and that it can be counterproductive in programs designed to explore fresh ideas and innovative approaches. In particular, some peer review systems have been criticized for permitting ad hoc and systematic bias for and against individuals, groups, or new ideas. Decisionmaking bias in the award of discretionary grants can result from favoritism, animus, or conflict of interest. It can stem from the identity of the potential grantee, as, for instance, where an "old boy" network exists or a "halo effect" causes poorly conceived proposals from well-known scientists to be funded, or from conflicts of interest that have to do with the affiliation or position of the decisionmaker. Bias can include personal or professional animus, a lack of regard for those mavericks who challenge conventional views, or a systematic refusal to give sufficient weight to particular criteria relevant to the decision. Finally, ex parte lobbying or even political pressure may occasionally cause an otherwise objective process to become biased for or against particular persons or approaches.

To the extent that bias infects it, the decisionmaking process loses objectivity and, consequently, legitimacy. While the incidence and impact of bias are not susceptible to empirical measurement, the Conference believes that, on balance, the peer review model has worked well[1] and is highly appropriate for awarding discretionary grants in the arts and sciences.[2] The Conference's recommendation is based largely on a study of programs in the National Institutes of Health, the National Science Foundation, the Environmental Protection Agency, and the National Endowment for the Arts. Although all rely heavily upon the principle of peer review in awarding discretionary grants, these agencies manage the peer review process in diverse ways. None has completely eliminated the potential for bias, though some have made great strides in that direction. Each can learn from the others, and all grantmaking agencies not included in the Conference study can learn from their experiences. These recommendations draw on their experience to suggest reforms that should further reduce the potential for bias at a relatively low cost.

RECOMMENDATION

I. Promoting Openness and Accountability

A. **Reviewer Meetings.** Agencies that rely upon peer review to evaluate grant proposals should generally assemble the reviewers for a meeting in which each reviewer, in the presence of the other members, has an opportunity to comment upon the evaluations made by other members. Such meetings may also be by telephone conference call.

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[1] To encourage flexibility, innovation, or a rapid response where warranted, some agencies that ordinarily rely on peer review to evaluate grant proposals (such as the National Science Foundation) have found it useful to set aside a small portion of the available funds for relatively brief, small awards outside the normal channels of peer review.

[2] Especially in the scientific agencies, a recent trend toward greater openness has been noted. This has been prompted in part through enactment of the Freedom of Information Act (FOIA), the Federal Advisory Committee Act (FACA), and the Privacy Act. FOIA requires every federal agency to make available to any person any record in the agency's possession (subject to several exceptions potentially relevant to the peer review process) upon a request by that person that reasonably describes the record. FACA requires federal agencies that rely on recommendations of advisory committees to charter these committees and to run them according to statutory standards of openness. The Privacy Act directs agencies to protect personal information in agency files from unauthorized disclosure and to give individuals an opportunity to review information about themselves and to require that the agency correct inaccuracies. While peer review committees clearly come within FACA's definitions, there have been significant litigation and uncertainty over the effect of these laws.

B. **Feedback and Rebuttal.** Insofar as practicable, agencies should provide applicants with an opportunity for feedback and rebuttal as follows:

(1) Agencies that rely on peer review should prepare and routinely transmit to all applicants brief summaries of the reasons for evaluation results.

(2) If peer review committees prepare written evaluations of individual applications, agencies should retain these documents for a full funding cycle, and should make available copies of such written evaluations to applicants upon request in a redacted form so that particular evaluations may not be attributed to particular reviewers. Agencies that retain documents prepared by peer reviewers should make them available in redacted form where practicable and where reviewers' candor would not be unduly affected.

(3) Statements and summaries of reasons should be made available to applicants sufficiently far in advance of the agency's final decision so that applicants may review the documents and submit comments for timely consideration by the peer reviewers or agency staff. Where this is not practicable, agencies should maintain an appropriate reconsideration system.

(4) Agencies that rely on peer review should develop guidelines identifying information that will normally be made available to grant applicants relating to their applications and specifying the procedures under which particular kinds of information will be available to different classes of requesters.

C. **Applicant Anonymity.** While applicant anonymity will often be infeasible and inconsistent with effective application of merit review criteria, agencies should be aware of situations in which not revealing to peer reviewers the identities of applicants for discretionary grants would further objective review. Agencies should consider allowing reviewers to conduct discrete portions of peer reviews under conditions of applicant anonymity in cases in which complete applicant anonymity is not feasible or consistent with effective application of merit review criteria.

D. **Reviewer Anonymity.**

(1) The agency should provide that, although the identities of all members of any peer review panels should be made available to applicants and the public, granting agencies should be authorized to refuse to disclose information that would enable applicants to identify the persons who reviewed in detail a particular application.

(2) Agencies that rely on peer review should inform all peer review panelists in writing of their Privacy Act obligations and of the penalties that may flow from a breach of confidence. Agencies should consider sanctions, including instituting debarment or suspension procedures, against any panel reviewer who knowingly breaches confidentiality.

E. **Contacts with Peer Reviewers, Staff, and Decisionmakers.**

While agencies that rely on peer review should encourage informal contacts between applicants and agency staff for the purpose of conveying general information, they should adopt appropriate statements of policy discouraging all ex parte contacts regarding particular grant proposals with peer reviewers and agency decisionmakers that attempt to influence grantmaking decisions outside the normal decisionmaking process.

II. Participants in the Review Process

A. **Composition and Structure of Review Committees.**

(1) Agencies that rely on peer review should endeavor to include some reviewers from related professional fields on peer review panels. Agencies should also consider including on the panels individuals who are not peers but who bring to bear perspectives relevant to the decision.

(2) To the extent consistent with agency resources and depending on the size and number of the grants awarded in a program, agencies should provide that the membership of peer review panels change on a regular basis, ensure that the number of persons serving on an individual peer review committee is sufficiently large to dilute the impact of any bias, permit duplicate reviews in two or more subcommittees, or allow multiple committees to perform a tiered review.

B. **Conflicts of Interest.**

(1) Agencies that rely on peer review should promulgate guidelines that prevent a person from reviewing or sitting on a panel that reviews his or her own grant application or the application of a relative, a close collaborator, a recently graduated former student, an institution by which the person is employed, or an affiliated institution. Insofar as possible, reviewers with a competing or other adverse interest to an application to be considered should not review that application.

(2) Agencies should provide that a reviewer must disclose a conflict of interest or appearance thereof to the agency and, if the reviewer continues to participate, to other members of the review committee.

(3) If necessary, agencies may provide for specific waivers, with disclosure, of the conflict of interest recommendations on a case-by-case basis when there is no other practical means for securing appropriate expert advice on a particular grant application.

(4) Agencies that rely on peer review should ensure that reviewers are informed and observe applicable rules or guidelines on bias and conflict of interest. In particular, agencies should caution persons on peer review panels of the need to protect against panel misuse of confidential information made available to it and should ensure that such information or position is not misused.

C. **Opportunity to Object to Reviewers.** Agencies that rely on peer review should provide that any applicant may submit a confidential list containing a small number of potential reviewers that the applicant deems objectionable together with a statement of the reasons for the challenges. Agencies should seriously consider such objections and honor those that are meritorious, unless the agency determines that a qualified group of peers cannot be assembled if all such challenges are honored.

D. **Scoring Applications.** Agencies that rely upon scoring systems for evaluating and ranking discretionary grant proposals should consider developing methodologies for ensuring fairness in scoring applications.

III. Audits for Potential Bias

Agencies that rely on peer review should implement independent reviews of the process for bias and conflict of interest.

Recommendation 93-4

Improving the Environment for Agency Rulemaking

Informed observers generally agree that the rulemaking process has become both increasingly less effective and more time-consuming. The Administrative Procedure Act does not reflect many of the current realities of rulemaking. The APA's cumbersome "formal rulemaking" procedures are rarely used except in some adjudicative-type rate proceedings. Meanwhile, the APA's simple "informal rulemaking" procedures (set forth in 5 USC §553) have been overlain with an increasing number of constraints: outside constraints imposed by Congress, the President, and the courts, and internal constraints arising from increasingly complex agency management of the rulemaking process.[1] As a result, many federal agencies, faced with unsatisfactory rulemaking accomplishments in recent years, have turned to alternatives such as less formal policy statements or adjudicative orders to achieve regulatory compliance.[2]

The Conference believes that the environment for agency legislative rulemaking can be improved. This recommendation sets out a coordinated framework of proposals aimed at promoting efficient and effective rulemaking by addressing constraints on the current process that derive from a variety of sources. We present an integrated approach for improving the rulemaking environment in order to relieve agencies of unnecessary pressures and disincentives relating to rulemaking. We also identify desirable revisions of section 553 relating to legislative rulemaking. In doing so, this recommendation both presents new proposals and incorporates previous Conference recommendations.

I. Presidential Constraints

We continue to support presidential coordination of agency policymaking as beneficial and necessary.[3] We are concerned, however, that, unless properly focused, this additional review may impose unnecessary costs. All recent presidents have undertaken some level of review and coordination of agency rulemaking. Presidential review of rules, as undertaken under various executive orders applied by the Office of Management and Budget and other White House entities, has often required agencies to submit nearly all proposed and final rules to a review process in which the rules are screened and analyzed for consistency with presidential objectives. Some of these objectives have been incorporated into analytical requirements found in separate executive orders.[4] This screening process can unduly slow the entire system of rulemaking; it can inhibit the growth of the promising consensus-based alternative of negotiated rulemaking;[5] and it can create undesirable tensions between the reviewing entities and agency policymakers. While these analytical emphases can be rationalized individually, in the aggregate, they can result in redundant requirements, boilerplate-laden documents, circumvention, delays, and clutter in the *Federal Register*. Although specific presidential review policies have varied among Administrations, these recommendations set forth principles that the Conference believes generally should govern presidential review of rules.

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[1] *See generally* McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L. J. 1385 (1991).

[2] *See* Conference Recommendation 92-2, "Agency Policy Statements," 1 CFR §305.92-2 (1993), which distinguished "legislative" rules, normally promulgated through notice-and-comment procedures, from interpretive rules and policy statements, which are exempt from such procedures. The present recommendation addresses legislative rulemaking.

[3] *See* Conference Recommendation 88-9, "Presidential Review of Agency Rulemaking" 1 CFR §305.88-9 (1993) (applying Presidential oversight to both executive branch and independent agencies).

We therefore recommend that presidential oversight and review be reserved for the most important rules and that the agencies be given clear policy guidance in a directive, approved by the President, specifying what is required. In addition, the reviewing or oversight entity should avoid, to the extent possible, extensive delays in the rulemaking process. The review process itself should be open to public scrutiny—following guidelines previously developed by the Administrative Conference.[6] The President's policy should encourage planning and coordination of regulatory initiatives, and early dialogue between agencies and the reviewing entity. To this end, the concept of a unified agenda of regulations is a useful tool and should be preserved. We also believe that additional non-APA analytical requirements should be kept to a minimum. The cumulative impact of such requirements on the rulemaking process should be considered before existing requirements are continued or additional ones imposed. We also believe it is useful to periodically reassess the continued viability and relevance of the various presidential directives.[7]

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[4] Among the mandates reflected in these executive orders are requirements that agency rulemakers include cost-benefit estimates and analyses of the proposed and final rule's impact on federalism, family values, and future litigation, of whether it effects a "regulatory taking," and of other matters. The Conference of course takes no position on the merits of the values underlying these executive orders.

[5] *See* Conference Recommendations 82-4 and 85-5, "Procedures for Negotiating Proposed Regulations," 1 CFR §§305.82-4, 305.85-5 (1993);" Negotiated Rulemaking Act of 1990, 5 USC §§561-69.

[6] *See* Conference Recommendation 88-9, "Presidential Review of Agency Rulemaking," 1 CFR §305.88-9 (1993) at ¶4.

[7] While the most recent executive order of presidential review of rules generally reflects the views set forth in this recommendation, *see* Executive Order 12866, 58 Fed. Reg. 51735 (1993), the Conference takes no position on the specifics of that order.

II. Legislative Constraints

Congress should similarly review and rationalize legislatively-mandated rulemaking procedures. Specifically, we recommend that it refrain, as it generally has done since the 1970s, from imposing program-specific rulemaking requirements that go beyond the APA's basic notice-and-comment procedures.[8] Statutory "on-the-record" and "hybrid" rulemaking provisions that require adjudicative fact-finding techniques such as cross-examination, or more stringent provisions for judicial review (in particular, use of the "substantial evidence" test instead of the normal "arbitrary and capricious" test), can be unnecessarily burdensome or confusing and should be repealed.[9] Although additional procedures can sometimes be beneficial—see, e.g., §307 of the Clean Air Act (providing additional safeguards for rulemaking with significant economic and competitive effects)[10]—they should be imposed only after careful review and attention by Congress to possible unintended consequences. Otherwise, such additions generally should be left to the discretion of individual agencies.[11]

Similarly, legislatively-imposed time limits on rulemaking, while understandable, can be unrealistic, resulting in either hastily-imposed rules or missed deadlines that undermine respect for the rulemaking process.[12] Legislative deadlines backed by statutory or regulatory "hammers" (mandating, for example, that the proposed rule or some other policy change[13] automatically take effect upon expiration of the deadline) are particularly undesirable and often counter-productive;[14] they are generally less desirable than the alternative of judicial enforcement of deadlines.[15]

Finally, legislation ancillary to the APA that creates additional rulemaking impediments should be reconsidered. Statutes such as the Regulatory Flexibility Act, which requires a special analysis of virtually all rules' effects on small business, may have laudable intentions, but their requirements are often both too broadly applicable and not sufficiently effective in achieving their goals. If such requirements are imposed, Congress should focus them more narrowly, by, for example, confining their application to significant rules or particular categories of rules.

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[8] *See* Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity to Comment in Informal Rulemaking," 1 CFR §305.76-3 (1993).

[9] *See* Conference Recommendation 80-1, "Trade Regulation Rulemaking Under the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act," 1 CFR §305.80-1 (1993).

[10] 42 USC §7607.

[11] See Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking," 1 CFR §305.76-3 (1993).

[12] *See* Conference Recommendation 78-3, "Time Limits on Agency Action," 1 CFR §305.78-3 (1993).

[13] *See, e.g.*, Conference Recommendation 90-8, "Rulemaking and Policymaking in the Medicaid Program," 1 CFR §305.90-8 (1993).

[14] Where the "hammer" applies because of a failure to meet a deadline, so that a proposed rule becomes effective, the anomalous result is that a policy that has withstood no public airing is implemented.

[15] Courts should continue, where appropriate, to consider whether agency action in a rulemaking is "unreasonably delayed." *See* 5 USC §706(1); Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984).

III. Judicial Constraints

Other constraints on rulemaking that warrant similar reconsideration have been imposed through judicial review. The APA, in section 706, provides that agency rules may be set aside if they are "arbitrary or capricious," represent an "abuse of discretion," or are "otherwise not in accordance with law." The evolving scope of judicial review of agency rules, along with the timing of such review at the preenforcement stage, has contributed to what is sometimes an overly intrusive inquiry. This, in turn, has led agencies to take defensive measures against such review. While some tension is an inevitable adjunct of the process of judicial review, we believe that steps can be taken to lessen some of the burdens without loss of effective outside scrutiny of agency rules.

The tendency of some courts to require extra-APA procedures in rulemaking was arrested by the Supreme Court's *Vermont Yankee* decision in 1978.[16] Nevertheless, while the prevailing judicial interpretation of the arbitrary-and-capricious standard of review (which became known as the "hard look doctrine") has promoted reasoned decisionmaking, courts have not infrequently remanded rules on the basis of an agency's failure to respond adequately to comments, consider relevant factors, or explain fully the bases for its rule. Courts should be sensitive not to require greater justification for rules than necessary; a reasoned statement that explains the basis and purpose of the rule and addresses significant issues raised in public comments should be adequate.

Preenforcement review, expanded by the Supreme Court in the 1967 *Abbott Laboratories* cases,[17] endorsed by the Conference in various recommendations,[18] and codified in numerous rulemaking programs, has the virtue of settling legal issues early and definitively. When overused, however, preenforcement review can have the negative effect of inducing precautionary challenges to most rules and the raising of as many objections to a rule as possible, including somewhat speculative challenges pertaining to the rule's potential application.

Under the *Abbott Laboratories* standard, challenges to a rule are permitted where issues are appropriate for judicial review and where the impact on a challenger is direct and immediate. The Conference believes that the *Abbott Laboratories* standard strikes a sensible balance, and that preenforcement challenges generally are appropriate where the administrative record provides a sufficient basis for the court to resolve the issues before it. Thus, a preenforcement challenge to a rule based on the procedures used in the rulemaking should normally be permitted. Preenforcement review that involves a facial challenge to a rule's substantive validity (whether because of a conflict with a statute or the Constitution, or because of the inadequacy of the facts or reasoning on which it is based) should also generally be heard.[19] In contrast, challenges to a rule because it might be applied in a particular way should normally be deferred until the rule has actually been applied.

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[16] Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

[17] Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).

[18] *See* Conference Recommendation 74-4, "Preenforcement Judicial Review of Rules of General Applicability," 1 CFR §305.74-4 (1993); Conference Recommendation 91-5, "Facilitating the Use of Rulemaking by the National Labor Relations Board," 1 CFR §305.91-5 (1993).

Although prompt resolution of legal issues is to be encouraged, Congress should be cautious in coupling mandated time-limited preenforcement review with preclusion of review at the enforcement stage. Such time-limited review should be provided for only in the situations and conditions specified in Recommendation 82-7.[20] Where Congress does set time limits for preenforcement review, it should, in the interests of consistency, generally specify that preenforcement review should occur within 90 days of a rule's issuance. Current statutory specifications vary. There does not seem to be any reason for variation that outweighs the benefits of uniformity in this context.

Congress should also amend any existing statutes that mandate use of the "substantial evidence" test for reviewing legislative rules, by replacing it with the "arbitrary and capricious" test. The occasional introduction of the substantial evidence test in the rulemaking context has created unnecessary confusion; some courts apply it in a manner identical to that of the "arbitrary and capricious" test; others believe that it sets a higher standard. The Conference believes that the arbitrary and capricious test provides sufficient review in the informal rulemaking context.

The intensity of judicial review directly affects the rulemaking process. For example, the scope of review of agency statutory interpretations is governed by the deferential *Chevron* test, which requires affirmance if the agency's interpretation of an ambiguous statute is permissible.[21] On the other hand, when reviewing the reasonableness of an agency's policy and factual justifications for its rules, courts apply the stricter "hard look" doctrine.[22] Deferential review of the legal issue of statutory interpretation, coupled with the rigorous review of a rule's factual and policy underpinnings that the "hard look" doctrine specifies, has been criticized as anomalous. The Conference believes, however, that the review standards can be harmonized by looking beyond the labels. That is, under both of these doctrines, courts are required to determine independently the limits of the agency's statutory authority and whether the factors the agency took into account in formulating the rule were permissible. Following that determination, courts properly defer to an agency's permissible reading of its statute and to its choice of inferences from the facts in making policy decisions. Courts would help make their review more consistent and predictable if they articulated more clearly this two-step approach. Both the *Chevron* and "hard look" doctrines would then be understood as including a searching review of the range of an agency's legally permissible choices (statutory, policy, and factual), combined with, in each instance, deference to the agency's reasonable selection among such choices, once the alternatives are determined to be within the permissible range.

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[19] A challenge based on the facial invalidity of the rule, in this context, would normally be directed at a requirement or course of action to which the agency has clearly committed itself.

[20] Recommendation 82-7, "Judicial Review of Rules in Enforcement Proceedings," 1 CFR §305.82-7 (1993), sets out criteria for when judicial review should be limited at the enforcement stage, and what kinds of issues should remain reviewable at that stage.

[21] Chevron USA Inc. v. NRDC, 467 U.S. 837 (1984).

[22] Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) (State Farm).

Finally, in order to prevent additional litigation, courts should be encouraged to address certain issues that arise in many if not most reviews of rules. Reviewing courts should, for example, specify, to the extent feasible, which portions of the rule, if any, are to be set aside, vacated, stayed or otherwise affected by the decision in the case. They should seek to ensure that portions of a rule unaffected by a finding of illegality remain in effect, unless the rule expressly or impliedly indicates that the rule is inseverable. A reviewing court should also consider the extent to which its mandate will apply retroactively. In considering the effect to be given to its decision, the court should weigh the impact of the decision on parties not before the court, and recognize their interest in being heard or adequately represented prior to any ruling that adversely affects them.

IV. Amendment of the APA

As we approach the fiftieth anniversary of the APA, some of its rulemaking provisions need to be updated. Section 553(c), which does not now state a length of time for the comment period, should be amended to specify that a comment period of "no fewer than at least 30 days" be provided (although a good cause exception for shorter periods should be incorporated). This would relieve agencies of the need to justify comment periods that were 30 days or longer. The thirty-day period is intended as a minimum, not a maximum; agencies would still be encouraged to allow longer comment periods and to leave the record open for the receipt of late comments.[23] Section 553 should also specify that a second round of notice and comment is not required where the final rule is the "logical outgrowth" of the proposed rule, thus codifying generally accepted doctrine.[24] A provision requiring maintenance of a public rulemaking file should be incorporated into section 553, so that those who seek access to the file are not forced to rely on the Freedom of Information Act to obtain it.[25] (The content of such a file is discussed further below in connection with internal agency management initiatives.)

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[23] *See* Conference Statement 7, "Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act," 1 CFR §310.7 (para. 2).

In addition, the requirement in section 553(c) of a statement of basis and purpose for the rule should be revised to require a "reasoned statement"[26] (deleting the "conciseness" provision), which includes a response to significant issues raised in the public comments.[27] These changes are designed to codify the salutary aspects of the caselaw on rulemaking, discourage insubstantial arguments and objections on review, and stem the tendency to require additional, more burdensome justifications.

Another long-overdue change in the Act is elimination of section 553(a)(2)'s exemption from notice-and-comment procedures for matters relating to "public property, loans, grants, benefits, or contracts." As the Conference recognized as early as 1969, this "proprietary exemption" is an anachronism.[28] The exemption for "military or foreign affairs function[s]" in section 553(a)(1) should be narrowed so that all but secret aspects of those functions are open to public comment.[29]

V. Internal Agency Management Initiatives

Rulemaking is not just a product of external constraints. The agency's own processes for developing rules and reviewing them internally affect the rulemaking environment. Thus, agency management initiatives can have a significant impact on the effectiveness and efficiency of rulemaking. The

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[24] *See* South Terminal Corp. v. EPA, 504 F.2d 646, 659 (1st Cir. 1974), in which the 1st Circuit originated the "logical outgrowth" test. It was subsequently embraced by other circuits, particularly the D.C. Circuit. See Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991); International Union, United Auto, Aerospace and Agr. Implement Workers of America v. OSHA, 938 F.2d 1310 (D.C.Cir. 1991); American Medical Association, 887 F.2d 760 (7th Cir. 1989); NRDC v. USEPA, 824 F.2d 1258 (1st Cir. 1987); United Steelworkers v. Schuykill Metal Corp., 828 F.2d 314 (5th Cir. 1987); National Black Media Coalition v. FCC, 791 F.2d 1016 (2nd Cir. 1986); Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985).

[25] Statement 7, *supra* n 23, at ¶4.

[26] State Farm, *supra* n. 22, 463 U.S. at 57 (quoting Greater Boston Television Corp. v, FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)).

[27] Conference Statement 7, *supra* n. 23, at ¶5.

[28] *See* Conference Recommendation 69-8, "Elimination of Certain Exemptions From the APA Rulemaking Requirements," 1 CFR §305.69-8 (1993).

[29] *See* Conference Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption from APA Rulemaking Requirements," 1 CFR §305.73-5 (1993).

Conference recommends a number of steps agency managers can take to improve their internal processes.

Senior agency staff should develop management strategies to set priorities and track agency rulemaking initiatives.[30] Agencies should seek to involve the presidential oversight entity in the rulemaking process as early as feasible, in order to reach agreement on the significance of rules in the developmental stage, to provide greater coordination, and to speed final oversight review. Agencies should also review their existing systems for developing and reviewing regulations, to determine where problems and bottlenecks are occurring. They should seek to achieve more rapid internal clearances of proposed and final rules, and to develop reasoned analyses[31] and responses to significant issues raised in public comments. They should also take steps to manage the rulemaking file (and associated requests for access to it).[32] The file should, to the extent feasible, contain notices of the rulemaking, all written[33] comments submitted to the agency, and copies or an index of all written factual material, studies, or reports substantially relied on or seriously considered by the agency in formulating its proposed and final rule (except insofar as disclosure is prohibited by law). Materials substantially relied on or seriously considered need not encompass every study, report, or other document that the agency may have in its files or has otherwise used, but they should include those that exerted a significant impact on the agency's thinking, even if they represent an approach that the agency ultimately did not accept.

Agencies should also consider innovative methods for developing and getting public input on rules. Agencies should use advisory or negotiated rulemaking committees where appropriate to improve the quality and acceptability of rules.[34] They should also consider the use of "direct final" rulemaking where appropriate to eliminate double review of noncontroversial rules. Direct final rulemaking involves issuing a rule for notice and comment, with an accompanying explanation that if the agency receives no notice during the comment period that any person intends to file an adverse comment, the rule will become effective 30 days (or some longer period) after the comment period closes.

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[30] *See* Conference Recommendation 87-1, "Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration," 1 CFR §305.87-1 (1993).

[31] *See* Conference Recommendation 85-2, "Agency Procedures for Performing Regulatory Analysis of Rules, 1 CFR §305.85-2 (1993); Conference Recommendation 88-7, "Valuation of Human Life in Regulatory Decisionmaking," 1 CFR §305.88-7 (1993).

[32] Computerized access should be made available, preferably in a uniform system government-wide. *See* Conference Recommendation 88-10, "Federal Agency Use of Computers in Acquiring and Releasing Information," 1 CFR §305.88-5 (1993).

[33] "Written" includes documents in electronic form.

[34] Any government-wide policy concerning the use of advisory committees should be consistent with their use as part of the process of negotiated rulemaking.

RECOMMENDATION

To improve the environment for agency legislative rulemaking, the President, Congress, and the courts should take steps to eliminate undue burdens on agency legislative rulemaking; Congress should update the Administrative Procedure Act's rulemaking provisions; and agencies should review their internal rulemaking environment and, where appropriate, implement internal management initiatives aimed at improving the effectiveness and efficiency of their efforts.

I. Presidential Oversight[35] of Rulemaking

A. The President's program for coordination and review of agency rules should be set forth in a directive that is reviewed periodically. The program should be sensitive to the burdens being imposed on the rulemaking process, and implementation of the program should ensure that it does not unduly delay or constrain rulemaking. The President should consider the cumulative impact of existing analytical requirements on the rulemaking process before continuing these requirements or imposing new ones.[36]

B. The President's directive, as well as the explanations provided and the procedures followed by the presidential oversight entity, should, insofar as practicable:

1. Promote dialogue and coordination between the oversight entity and rulemaking agencies in the early identification and selection of rules warranting application of the review process;
2. Set forth the relevant analytical requirements that the oversight entity should apply to agency rulemaking, and provide interpretive guidance to assist agencies in complying with these requirements;
3. Ensure appropriate expedition and openness in the process, in accordance with Conference Recommendation 88-9;
4. Support a process for planning regulatory initiatives and tracking rule development; and
5. Encourage and support agency efforts to use consensual processes such as negotiated rulemaking.

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[35] The recommendations contained in this section apply to oversight of both executive and independent agencies. The Conference has previously recommended that presidential review of rulemaking apply to the independent agencies to the same extent it applies to the rulemaking of the Executive Branch departments and agencies. *See* Conference Recommendation 88-9, "Presidential Review of Agency Rulemaking," 1 CFR §305.88-9 (1993).

The term "presidential oversight entity," as used herein, is that part of the Executive Office of the President delegated responsibility for review and oversight of agency rulemaking.

[36] In recommending review of analytical requirements beyond those contained in the APA, we express no position on the substantive policies being mandated.

II. Congressional Structuring of Rulemaking

A. Section 553 of Title 5, United States Code, which established the framework for legislative rulemaking, has operated most efficiently when not encumbered by additional procedural requirements. Congress generally should refrain from creating program-specific rulemaking procedures or analytical requirements beyond those required by the APA. When Congress determines that additional procedures beyond those required by section 553 are justified by the nature of a particular program, such procedures should be focused on identified problems and, where possible, adopted incrementally or after experimentation.[37] In addition, Congress should repeal formal ("on-the-record") or other adjudicative fact-finding procedures in rulemaking in any existing statutes mandating such procedures.[38]

B. In general, Congress should not legislate time limits on rulemaking, but should instead rely on judicial enforcement of prompt agency action under §706(1) of the APA.[39] However, if Congress determines that a deadline is appropriate, it also should ensure that the agency has sufficient resources to support the required rulemaking effort without distorting the agency's other regulatory functions. If Congress further determines that a default rule is necessary where an agency does not meet a deadline, it should specify the terms of that rule and, in particular, should not impose "regulatory hammers" that would cause the agency's proposed rules to take effect automatically.

C. Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues.[40] If Congress nonetheless determines that such analytical requirements are necessary, Congress should structure its requirements more narrowly (e.g., by confining their application to the most significant rules or to rules likely to be affected by the stated concern).

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[37] *See*, for example, the development of more specific, but not necessarily more burdensome, procedures for EPA rulemaking that has significant economic and competitive effects. *See* 42 USC §7607 (§307 of the Clean Air Act). *See also* Conference Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking," 1 CFR §305.76-3 (1993), which encourages agency experimentation with use of oral procedures beyond simple notice and comment in some circumstances.

[38] The Conference has recommended against the mandated use of cross-examination and other "adjudicative" procedures for agency fact-finding in rulemaking. *See, e.g.*, Conference Recommendation 79-1, "Hybrid Rulemaking Procedures of the Federal Trade Commission," 1 CFR §305.79-1 (1993). The Conference recognizes, however, that more formal procedures may be appropriate for ratemaking based on party-related facts. *See* United States v. Florida East Coast Ry, 410 U.S. 224 (1973). Congress may also wish to consider whether less formal hybrid processes may be useful in contexts currently requiring formal rulemaking.

[39] This is not a comment on the legitimacy of congressional directives in this regard, but on their impracticality. On the other hand, agency self-imposed deadlines are encouraged, see V(D), below. For more detailed advice on time limits, see paragraph 5 of Conference Recommendation 78-3, "Time Limits on Agency Action," 1 CFR §305.78-3 (1993).

[40] *See, e.g.*, the Regulatory Flexibility Act of 1980. The Conference takes no position on the substantive issues the Act seeks to address. Insofar as possible, however, such concerns are more appropriately included in the President's oversight guidelines. *See* I(B)(2) above.

III. Timing and Scope of Judicial Review

Congress and the courts generally should be sensitive to the impact of judicial review on agency rulemaking and should seek to simplify, clarify, and harmonize provisions for judicial review of rules.

A. Congress and the Courts

In determining whether preenforcement challenges to rules are appropriate, courts have traditionally evaluated "both the fitness of the issues for judicial decision and the hardship to the parties of withholding its consideration."[41] Adherence to this standard benefits both agencies and those affected by agency rules. Congress generally should authorize and courts should allow preenforcement challenges where the administrative record is a sufficient basis for resolving the issues. Thus, preenforcement challenges to a rule based on the procedures used in the rulemaking or on the asserted substantive invalidity of the rule, however it would be applied, should normally be permitted. Claims of substantive invalidity would include facial challenges based on statutory or constitutional grounds, or asserting the inadequacy of the facts or reasoning underlying the rule. Challenges to a rule on the basis that the rule might be applied in a particular way should normally be deferred until the application seems likely or has occurred.

B. Congress

1. Congress should be cautious in mandating time-limited preenforcement review coupled with preclusion of review at the enforcement stage, and should rely on time limits only in the situations and conditions specified in Recommendation 82-7.[42] Congressional time limits on preenforcement review should be understood to bar later challenges in the enforcement context only to the extent specified by Congress. Where Congress mandates a time limit on preenforcement review, it generally should specify that such review be requested within 90 days of the issuance of the rule.[43] It should also provide that preenforcement review cases be directly reviewable in the courts of appeals, and that a stay or partial stay of the rule's effectiveness ordinarily be issued only on the demonstration of likelihood of success on the merits and the prospect of significant private harm if the rule is permitted to take effect.

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[41] Abbott Laboratories v. Gardner, *supra* n. 17, 387 U.S. at 149.

[42] *See* Conference Recommendation 82-7, "Judicial Review of Rules in Enforcement Proceedings," 1 CFR §305.82-7 (1993).

[43] Congress should likewise reevaluate existing statutes for conformity with this approach.

2. The standards set out in §706(2)(A) of the APA's judicial review provisions should apply in all cases involving review of rules. Specifically, Congress should not provide for the use of the "substantial evidence" test for agency rules. It should conform existing statutes to this standard by deleting the use of the "substantial evidence" test for review of agency rules.

C. Courts

1. In articulating the doctrines used in the judicial review of rulemaking, reviewing courts should more clearly harmonize the deferential *Chevron* doctrine, applied in reviewing agency interpretation of its statutory authority, with the "hard look" doctrine, used in examining an agency's justification for its rule. Courts, in applying these doctrines, should recognize that both the *Chevron* and "hard look" tests call for a searching review of the range of factors or permissible choices that may be considered by the agency, and require deference to agency application of those factors once they are shown to be legally appropriate.

2. When reviewing an agency's explanation for its rule, courts should consider the context of the entire proceeding and concern themselves principally with whether the agency's overall explanation and analysis is reasonable, including its response to the significant issues raised in public comments.

3. In reviewing challenges to agency rules, courts should, to the extent feasible and after taking into account the effect of the decision on affected persons not before the court, consider: (a) whether any portion of a rule unaffected by a finding of illegality should remain in full force and effect; (b) which portions of the challenged rule, if any, are to be set aside, vacated, stayed, or otherwise affected by the court's decision in a case; and (c) the extent to which the court's mandate should apply retroactively.

4. Courts should continue, where appropriate, to consider whether agency action in a rulemaking is "unreasonably delayed."[44]

IV. Amendments to the APA's Legislative Rulemaking Provisions

Congress should update the APA and eliminate outmoded provisions. It should codify court decisions that have increased the effectiveness of public participation in the rulemaking process. In particular, Congress should consider amending section 553 of the APA to:

A. Eliminate the exemption (§553(a)(2)) for rules relating to public property, loans, grants, benefits or contracts, and delete the exemption (§553(a)(1)) of military and foreign affairs matters, except for secret matters;[45]

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[44] *See supra* notes 15 and 39.

[45] *See* Conference Recommendation 69-8, "Elimination of Certain Exemptions From the APA Rulemaking Requirements," 1 CFR §305.69-8 (1993), and Conference Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption from APA Rulemaking

B. Specify a comment period of "no fewer than 30 days" (§553(c)),[46] provided that a good cause provision allowing shorter comment periods or no comment period is incorporated, and codify the doctrine holding that a second round of notice and comment is not required if the final rule is a "logical outgrowth" of the noticed proposed rule;

C. Require establishment of a public rulemaking file beginning no later than the date on which an agency publishes an advance notice of proposed rulemaking or notice of proposed rulemaking, whichever is earlier.

D. Restate the "concise" statement of basis and purpose requirement (§553(c)) by codifying existing doctrine that a rule must be supported by a "reasoned statement," and that such statement respond to the significant issues raised in public comments.

To the extent permitted by law, agencies should adopt these proposed policies pending Congressional action.

V. Agency Management Initiatives

In order to improve their internal rulemaking environments, agencies should develop management techniques to ensure efficient and effective administration of rulemaking. Such techniques should include:

A. Systematically setting priorities at the highest agency levels and tracking rulemaking initiatives, including identifying clearly who has the authority to ensure that agency schedules and policies are followed;

B. Coordinating with the presidential oversight entity on the identification of rules warranting review as early in the process as is feasible, and establishing internal review procedures at the highest levels to ensure compliance with presidential analytical requirements;

C. Reviewing the agency's existing system for developing and reviewing regulations, to determine where problems and bottlenecks are occurring, and to improve and streamline the process;

D. Achieving timely internal clearances of proposed and final rules, using publicly announced schedules for particular rulemaking proceedings;

E. Managing rulemaking files, so that maximum disclosure to the public is achieved during the comment period and so that a usable and reliable file is available for purposes of judicial review. The rulemaking file should, insofar as feasible, include (1) all notices pertaining to the rulemaking, (2) copies or an

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Requirements," 1 CFR §305.73-5 (1993). The latter recommendation urged eliminating the APA's categorical exemption for matters pertaining to the military or foreign affairs function. It does recognize, however, that a modified exemption may be appropriate for matters "specifically required by executive order to be kept secret in the interest of national defense or foreign policy."

[46] The 30-day period is intended as a minimum, not a maximum. Agencies are encouraged to use longer periods for public comment.

index of all written[47] factual material, studies, and reports substantially relied on or seriously considered by agency personnel in formulating the proposed or final rule (except insofar as disclosure is prohibited by law), (3) all written comments submitted to the agency, and (4) any other material required by statute, executive order, or agency rule to be made public in connection with the rulemaking.[48]

F. Making use, of negotiated rulemaking and advisory committees;

G. Considering innovative methods for reducing the time required to develop final rules without eliminating the opportunity for consideration and comment;

H. Taking steps to ensure that proposed rules are acted on in a reasonably timely manner or withdrawn; and

I. Evaluating and reconsidering existing rules and initiating amendments and repeals where appropriate.

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[47] "Written" includes documents in electronic form.

[48] *See* Conference Statement 7, 1 CFR §310.7 (1993), "Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act."

Recommendation 93-5

Procedures for Regulation of Pesticides

The Environmental Protection Agency cannot accomplish its substantive mission in regulating pesticides without change and improvement in the Agency's regulatory procedures. The Conference recommends the adoption of a more coordinated and strategic procedural framework for the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). EPA needs procedures that create multiple and reinforcing incentives for regulatory compliance by registrants, for timely and accurate decisionmaking by EPA, and for effective public participation.

I. The Reregistration Process

The reregistration of existing pesticides under contemporary risk assessment standards, and the removal of unacceptable pesticides from the marketplace, are examples where procedures can hinder the agency's prospects for success in its substantive mission. Reregistration of existing pesticides, which Congress originally directed to be completed by 1976, became sufficiently delayed so that Congress in 1988 amended FIFRA specifically to force the completion of reregistration by 1998. Yet subsequent delays in the reregistration process may cause EPA to miss this congressional deadline. To some extent, the delay may reflect the underlying difficulty and resource-intensiveness of the risk assessment enterprise with which EPA has been charged. There are some 50,000 pesticide products that are separately formulated from 642 identified active ingredients. Although EPA has tried to expedite its task by focusing reregistration on some 402 "cases" (composed of single or related active ingredients), each case can require evaluation of 100-150 separate studies, every one of which may pose further questions of scientific protocol and interpretation. It may be that EPA's Office of Pesticide Programs needs more personnel to match its regulatory task.

Whatever the case for additional resources (a question not addressed by the Conference), there is a more basic need for timely and adequate data from registrants—all else in the reregistration process depends on this. Yet the reregistration process does not now provide sufficient procedural incentives to encourage submission of timely and adequate data. In general, because registrants continue to market their products during reregistration, they have little to lose by regulatory decisions that are reached later rather than sooner. Although the 1988 FIFRA Amendments require registrants to identify data gaps, and commit to fill them, the 1988 Amendments do not provide the agency with sufficient tools to police tardy or inadequate data submissions.

As to tardiness, the 1988 Amendments authorized the agency to suspend registrations of those registrants that fail to submit data. But EPA must first provide nonsubmitters with 30-days notice in response to which registrants can demand a limited hearing (which must be held within 75 days); the 1988 Amendments further provide that registrants suspended for not submitting data can have their registrations "reinstated" upon submission of the data. Some registrants, ironically, have used these suspension procedures as a means of obtaining penalty-free and self-awarded extensions of time. In the seven months between August 1991 and February 1992, for example, EPA found it necessary to issue 70 Notices of Intent to Suspend for nonsubmittal of data, yet in the majority of these instances (53) the registrants merely submitted their data prior to exhausting their procedural rights and were no worse off for having missed their deadlines. To create an additional disincentive for untimely data submissions it is necessary to make lateness costly to the registrant. To this end, the Conference recommends that Congress authorize EPA to impose civil money penalties for untimely data.

As to the adequacy of data, EPA may now have the theoretical (but untested in court) capacity to suspend or cancel the registration of those pesticides for which inadequate data have been submitted. However, the more common response to inadequate data is a "data call-in," through which the agency demands that studies be redone—a source of additional delay that the agency has identified as significant. Even with respect to its highest priority pesticides, EPA has in the recent past found 50 percent of studies to be either inadequate, "upgradable" or otherwise requiring supplementation. Although the cost of redoing studies should provide some incentive for registrants to ensure that their studies meet EPA's quality criteria, it does not seem to provide a sufficient incentive. In fairness to some registrants, there is evidence that EPA itself may be partially to blame for the high rates of data rejection. In 1992, an internal agency review found that misinterpretation of data requirements and poor guidance from EPA case managers were in part responsible for the inadequacy of data submissions. The Conference therefore recommends that EPA promulgate and communicate clear data standards and guidance on the data expected from registrants. To help prevent the submission of inadequate data even after sufficiently clear agency guidance has been given, the Conference recommends that Congress authorize EPA to levy administrative civil money penalties upon registrants submitting data that fail to meet previously announced standards. This will not only create incentives for registrants to take the extra steps necessary to ensure the adequacy of their submittals, but it will also create incentives for the agency to make clear its expectations.

Whatever the additional tactical advantages that the agency may gain by improving its own ability to enforce data timeliness and adequacy, the sheer number of studies and the innumerable decisions requiring agency discretion suggest that more global incentives are needed to ensure that registrants themselves have a stake in timely and adequate data. The danger is that the reregistration process now has become, even with the best of intentions, an analytical treadmill powered by the rhythms of data call-ins, subsequent requests for data waivers and time extensions, submission of data that do not always meet EPA's standards for adequacy, and further data call-ins that restart the sequence. The Conference believes that the unique demands of the reregistration process justify congressional consideration of a "hammer" provision that would legislatively impose an automatic suspension of all "List A" pesticides (those high-priority pesticides to which there is greatest human exposure) for which there are still significant data gaps within the registrant's control, and of which the registrant is aware—subject to a provision for a registrant to petition for reinstatement. Such a provision would not only provide an overarching incentive for registrants to favor the completion rather than postponement of their data obligations, but it would also better align the reregistration process with FIFRA's central procedural presumption—that, in the face of uncertainty, applicants (especially those seeking to reregister pesticides with extensive human exposure) should bear the burden of proof in establishing that their pesticides do not pose unreasonable risks.

II. Suspension and Cancellation Hearings

Apart from improvements in the reregistration process, the Conference urges Congress to substitute a relatively informal decisionmaking process for the formal adjudicatory hearings that registrants can now demand in cancellation and suspension matters. In the past, formal hearings under FIFRA have averaged 1,000 days to complete. These hearings can directly impose on EPA significant resource costs and can also indirectly discourage the agency from aggressive prehearing negotiations with registrants (lest the registrant "take EPA to hearing"). It is not surprising that EPA has long sought alternatives to cancellation hearings. For years, it sought to identify problem pesticides for heightened regulatory attention in a "Special Review" process. There is little need for procedural formality in these types of decisions. At issue in most cancellation and suspension proceedings are scientific data concerning risks and benefits, disputes over which can generally be well-ventilated when EPA gives registrants detailed reasons for the agency's actions and then provides registrants with sufficient time to file responsive written comments and supporting documentation. For those cases where oral testimony or cross-examination is justified, the benefits of more formal procedures can be preserved by providing registrants an opportunity to show cause why such procedures are warranted. Accordingly, the Conference recommends that Congress pattern cancellation and suspension proceedings on a basic notice-and-comment model, with more formal procedures available only if a party will be demonstrably prejudiced by the informal procedure.

III. Labeling and Phase-down Procedures

Although the reregistration process and adjudicatory hearings are the most visible aspects of pesticide regulation in need of procedural improvement, they are not the only places where procedural reform is important. Since the late 1980's, EPA has in fact sought to reduce the risks of pesticides through private negotiations with registrants over label changes that impose restrictions on use. Such regulatory action has the potential to attain interim risk-reduction quickly when warranted by available data, without going through the cumbersome Special Review and cancellation procedures, even when complete reregistration may still be years away. But there are also disadvantages to relying so heavily on private negotiations with registrants—chief among them the lack of participation among the various interested publics in crafting label changes. In the early 1980's, similar concern about privately negotiated Special Review and pre-Special Review decisions seriously undermined the agency's credibility and slowed regulatory progress. In 1985, EPA adopted procedures to open the door for information from, and participation by, the public in those processes.[1] The Conference recommends that EPA adopt analogous procedures to regularize and open the agency's negotiated label program. In addition, because label changes are effective in reducing risk only if they are actually implemented in the field, the Conference recommends procedures to facilitate feedback from registrants, pesticide users, and all other interested persons on the effectiveness or ineffectiveness of the interim risk-reduction measures EPA has adopted. Moreover, the Conference recommends that EPA's Office Of Pesticide Programs (OPP) establish regular channels of communication with EPA's Office of Enforcement and Compliance Assurance to inform that office of all label changes and of any material information received by OPP on noncompliance with such changes.

The Conference also urges Congress to consider providing EPA with a new procedural device designed to accommodate a safer pesticides policy: the ability by informal procedures to order the phase-down of existing pesticides when there are available for use safer, effective pest management products or practices.[2]

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[1] 40 CFR Part 154, Subpart B.

[2] Without taking any position on the substantive questions involved in determining the relative safety and effectiveness of pest control measures, the Conference notes EPA's interest in both the present and prior presidential administrations in developing such a substantive capability.

Empowering the agency to develop an informal phase-down mechanism would have several procedural advantages. First, ordering the phase down of an existing pesticide on relative risk grounds will cause less stigmatization of an existing product than would a cancellation proceeding based on the traditional, more absolutist "unreasonable risk" judgment. Second, phase-down procedures provide for an incremental style of decisionmaking in which EPA's reasoned judgments about comparative risk can be tested and reevaluated without making irreversible decisions about existing pesticides in cancellation proceedings. Finally, phase-down procedures based on relative risk can reinforce and integrate EPA's pesticide programs under FIFRA with other federal environmental programs.

RECOMMENDATION

I. Adequacy and Timeliness of Data

A. EPA should adopt, whenever possible, rules setting clear standards for pesticide reregistration data and should communicate those standards to registrants.

B. Congress should authorize EPA to impose administrative civil money penalties on registrants for the failure to submit data by any applicable deadline, or for submitting data (even if timely) that do not comply with the data standards adopted by EPA.[3]

C. Congress should consider imposing an automatic suspension of "List A" (high priority) pesticides for which there still remain, by a date to be set by Congress, previously identified and significant gaps in data within the registrant's control, and of which the registrant is on notice. Once suspended, pesticides could be reinstated through a petition process.

II. Informal Procedures

A. Congress should eliminate the provisions in FIFRA allowing for formal adjudicatory hearings in proposed suspension or cancellation actions and should provide instead an informal procedure, including notice in the Federal Register, that informs registrants and others of the specific grounds on which EPA bases its proposed action and that provides a reasonable opportunity to file written comments and data. Only if a party will be demonstrably prejudiced by the written notice-and-comment process should the agency be required to grant the right to introduce oral testimony or to subpoena and cross-examine witnesses.

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[3] Imposition of penalties should be through formal adjudication. See Conference Recommendation 93-1 "Use of APA Formal Procedures in Civil Money Penalty Proceedings," 58 CFR 45409 (Aug. 30, 1993).

B. Congress should consider providing EPA the authority to order a phase down in the use of any registered pesticide through an informal notice-and-comment procedure in which EPA considers such factors as the relative risks and benefits of the pesticide at issue when compared with alternative pest management products and practices.

III. Public Participation

A. EPA should regularize and open for broader public participation its informal procedures for achieving interim risk reduction through pesticide label changes. EPA should inform the public, through a Federal Register notice, when it commences private label negotiations with registrants. EPA should simultaneously open a public "negotiation docket" into which interested persons may submit comments they believe might be relevant, for consideration by EPA and the registrants during their negotiations. If, after negotiations with registrants, EPA proposes a label change, it should publish a notice of the proposed change in the Federal Register and provide the public an opportunity to file written comments. The notice should include a concise, general statement of the proposed label's basis and purpose, including a summary of the material aspects of the agency's negotiations with registrants.

B. After requiring a label change, EPA should establish and publicize the availability of a "compliance docket," for any input about the effectiveness or ineffectiveness of interim risk-reduction measures. In addition, EPA's Office of Pesticide Programs (OPP) should communicate to EPA's Office of Enforcement and Compliance Assurance the adoption by OPP of label changes and any material information received by OPP in its compliance docket.

Statement 16

Right to Consult with Counsel in Agency Investigations

In recent years, Congress has attached sanctions to an increasingly wide range of regulatory violations, causing federal administrative agencies to become involved more routinely in investigations that lead to civil or criminal prosecution. The Administrative Conference has completed a study that explores the procedures that govern the relationship between the agency and a person compelled to appear before the agency in such investigations.

The Administrative Procedure Act at Section 555(b) provides that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." This brief reference to counsel in the APA leaves a number of questions open. The Act, for example, does not specify the types of actions attorneys may take in representing their clients during agency investigative proceedings. It also does not indicate precisely which persons coming in contact with an agency may invoke the right to counsel.[1]

Because the roles of investigators in federal agencies, and the methods by which witnesses or parties appear before agencies vary considerably, the Administrative Conference does not believe it can develop a uniform set of recommendations concerning these procedures. However, the Conference believes it would be valuable to provide a statement on some of the issues raised in such investigations concerning the role of counsel so that those government officials involved can be made aware of the issues and seek additional guidance where warranted.

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[1] The 1941 Attorney General's Report on Administrative Procedure in Government Agencies is strangely taciturn on the subject of legal representation. Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941). The report throughout refers to the presentations and contentions of "parties," without any indication whether parties would or would not have the benefit of legal counsel. Statements in both House and Senate committee reports regarding this provision of the APA state simply that it is "designed to confirm and make effective" the "statutory and mandatory right" of interested persons to appear personally or with counsel before the agency. Sen. Doc. No. 248, 79th Cong., 2d Sess. 205, 263 (1946).

I. Agency Exclusion of Counsel

Although courts construing the APA's right-to-counsel provision have held that the right includes the power to retain counsel of one's own choosing, some federal agencies have, by rule or order, reserved the power to exclude counsel who represents a person compelled to appear before an agency representative during an investigation. They have done so out of a concern that the particular attorney may impair the effectiveness of the investigation, especially where the attorney represents either multiple witnesses, or a witness and his or her employer.

Agencies should consider whether, in most situations, a person compelled to appear in agency investigative proceedings ought to have the discretion to choose his or her own counsel, even where counsel represents multiple witnesses or parties in the matter. As courts have held, an agency must have "concrete evidence" that an investigation will be impaired before it may exclude counsel.[2] Thus, the mere fact of multiple representation, an employment relationship between the witness and some other party involved in the investigation, or past dealings between the agency and a particular attorney should not be considered, in and of themselves, a sufficient basis for excluding the counsel of a witness.

Regardless of an agency's decision on the above matter, it has the power to exclude counsel for disruptive or obstructionist behavior during the proceedings, and to take action in situations where the attorney is suspected of personal involvement in the potential violations or matters under investigation.

II. Consultation with Auxiliary Experts

Because of the highly technical nature of many regulatory fields, attorneys who advise witnesses or parties in some agency investigations must consult with accountants, engineers, economists, or other experts in order to provide effective legal assistance. The prevailing practice among federal agencies is to allow such consultation with auxiliary personnel, either by allowing the expert to attend the proceedings or by allowing the attorney a reasonable opportunity during the proceeding to consult with the expert about the substance of the investigation. Agencies that do not currently provide this opportunity should consider whether to allow counsel representing a person compelled to appear before the agency reasonable access to auxiliary experts, regardless of whether the investigation involves civil or criminal sanctions.

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[2] *See* SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976); Professional Reactor Operator Society v. NRC, 939 F.2d 1047 (D.C. Cir. 1991).

III. Informing Persons of their Right to Counsel

Agencies should be sensitive to the right to counsel that persons compelled to appear before it are granted under the APA and other statutes, and should consider when it is appropriate to advise such an individual of this right. Where necessary, agencies should consider providing training on this subject to field investigators. In the interest of maintaining an effective working relationship between federal regulatory agencies and regulated parties, agencies should consider whether it is appropriate to conduct a compelled investigative proceeding in the absence of legal counsel when it is apparent that a person is unaware of his or her right to counsel.

REPORTS

Report for Recommendation 93-1

Close Enough for Government Work?— Using Informal Procedures for Imposing Administrative Penalties

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

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Introduction

No regulatory system can be effective without enforcement, and monetary penalties are both historically accepted and generally believed to be an important enforcement tool. There are several models for monetary penalties. One is the model of criminal fines.[1] As practically the only criminal penalty available to nonnatural persons, and as an adjunct to other criminal sentences, criminal fines continue to play an important role in regulatory enforcement. Both the nature of the offense and the resources required to prosecute criminal cases, however, necessarily limit their reach.

Another model is the judicially imposed civil penalty.[2] Under this model, the burden of proof is on the agency to prove the violation, and the determination of the violation is a jury question.[3] The court determines the amount of the penalty.[4] This judicial model traditionally was the primary means provided for assessing a civil penalty, but the government resources necessary to bring such a case militate against using this tool except in "big" cases.

A third model involves the administrative assessment of a monetary penalty, but this model has at least three subsets. At one pole is the administrative penalty imposed through a formal adjudication under the Administrative Procedure Act (APA).[5] Here the administrative adjudication mirrors the trial in the judicially imposed civil penalty. The agency has the burden of proving the violation.[6] An Administrative Law Judge (ALJ) generally makes a recommended or initial decision as to the violation and the amount of the penalty.[7] After the opportunity for parties to file exceptions, the agency makes the final decision based on the record. This decision then may be reviewed under the APA or a specific review statute, which usually would require the reviewing court to uphold the agency determination and penalty amount if supported by substantial evidence in the record.[8] If the penalty amount is not adequately justified, the court should not itself set the penalty amount at the right level but should remand to the agency to set the amount, because it is the agency that is to assess the penalty.

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[1] *See, e.g.*, 33 USC §1319(c) (1988)(providing criminal penalties of not less than $2500 nor more than $25,000 per day for a first time negligent violation, rising to $50,000 per day for subsequent negligent violations; not less than $5000 nor more than $50,000 per day for a first time knowing violation, rising to $100,000 per day for subsequent violations; not more than $250,000 for a violation that the person knows places another person in imminent danger of death or serious bodily injury, rising to $1 million if the person is an organization; and $10,000 for a first time false statement, rising to $20,000 for subsequent violations).

[2] *See, e.g.*, 33 USC §1319(d) (1988)(up to $25,000 per day for each violation).

[3] *See* Tull v. United States, 107 S.Ct. 1831 (1987).

[4] *See, e.g.*, 33 USC §1319(d)(1988)(listing factors court shall consider in "determining the amount of a civil penalty"). The law does not appear to be clear as to whether the burden of proof or persuasion lies with the government to support a particular money penalty or with the defendant to reduce the maximum statutory amount below its maximum level. *See, e.g.*, Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1142 (11th Cir. 1990)(holding that once a violation of the Clean Water Act is made out, some fine is required and remanding to district court first to determine maximum statutory fine applicable to defendant and then to determine whether a lesser amount is appropriate in light of penalty factors).

[5] *See* 5 USC §§554, 556, 557 (1988).

[6] *See* 5 USC §556(d) (1988).

[7] *See, e.g.*, All Regions Chemical Labs, Inc. v. EPA, 932 F.2d 73 (1st Cir. 1991).

At the other pole is an agency assessment of a penalty after informal or no procedures at all. Here the administrative assessment is more like an administrative complaint; it is what the agency thinks to be the case, what the agency alleges to be true, and what the agency thinks is appropriate as a penalty. The agency need not involve the Department of Justice or the courts when making the assessment or, most importantly, when compromising the penalty amount. Traditionally, the understanding was that the agency could not collect this assessment, absent agreement, without a judicial proceeding in which the agency assessment would be subject to *de novo* review.[9] What both these poles have in common is that the defendant has an opportunity for a full trial as to liability and penalty amount before a strictly neutral judge, at one before a court, at the other before an ALJ.

These two poles, however, do not exhaust the possibilities of the administrative penalty assessment model. Between them is the situation where the statute calls for or allows the use of informal administrative procedures—that is, something less than a formal, APA proceeding[10]—but the judicial review is not *de novo*. Instead, it is deferential review; either substantial evidence review[11] or arbitrary, capricious, or abuse of discretion review.[12] Here the defendant does not receive a full trial anywhere.

In 1986, for apparently the first time, Congress expressly provided for the last of these situations, authorizing the Administrator of the Environmental Protection Agency (EPA) to impose administrative penalties using procedures

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[8] *See, e.g.*, 5 USC §706(2)(E) (1988). Review of the penalty amount, as opposed to the fact of violation, may also be reviewed on the basis of abuse of discretion, because of the notion that setting a penalty amount is an exercise of discretion. *See, e.g.*, 33 USC §1319(g)(8)(1988).

[9] Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COL. L. REV. 1436, 1439 (1979).

[10] *See, e.g.*, 33 USC §1319(g)(2)(A)(1988)(requiring an opportunity to request a hearing at which one might be heard and present evidence, but not a formal, APA hearing before assessing a penalty not to exceed $25,000 for violating requirements of the Clean Water Act).

[11] *See, e.g.*, 33 USC §1319(g)(8)(1988)(substantial evidence review of the violation and abuse of discretion review for the amount of the penalty).

[12] *See* 5 USC §706(2)(A)(1988). Absent a specific review statute, which, however, is increasingly evident, the fall-back position of APA review might have been de novo review under 5 USC §706(2)(F)(1988), but that provision has been largely eliminated from administrative law after the Court's explanation in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

"not...subject to Section 554 or 556 of Title 5" but which "shall provide a reasonable opportunity to be heard and to present evidence."[13] A person assessed a penalty under these procedures could seek review before a district court, which could set aside the penalty assessment only if there was not substantial evidence on the record, taken as a whole, to support the finding of violation, or if the amount of the penalty assessed constituted an abuse of discretion.[14] Within a year, Congress passed three more laws with similar provisions.[15] Each of these three created a two-tier penalty structure, specifically requiring a formal, APA adjudication for the larger (Class II) penalties, while explicitly or implicitly providing for informal procedures to govern lesser (Class I) penalties.[16]

While these were not the first and are not the only administrative penalties to be imposed after only informal procedures,[17] they are different because Congress apparently made a conscious decision that the formal procedures of the APA should not apply, and there is some indication that this decision in 1986 and 1987 was not an isolated incident. In 1990 Congress expressly provided in two more statutes for the two-tier penalty system where the larger penalties require formal, APA adjudication but the lesser penalties do not.[18]

If this constitutes a trend toward greater use of informal procedures for assessing administrative penalties, it would be in tension with the longstanding and consistent recommendations of the Administrative Conference of the United States[19] as well as the views and recommendations of administrative law scholars of all stripes.[20] The purpose of this report is to explore this development and its implications. Part I briefly surveys the history of administrative penalties to provide the legal background against which Congress' recent actions take place. Part II explores the legislative history of the recent statutes to determine why Congress wished to make the formal procedures of the APA inapplicable to the particular penalties involved. Part III describes the informal procedures by which especially EPA but also the Corps of Engineers and the Coast Guard have implemented their penalty programs. Part IV then relates the experience that EPA has had using the informal penalty procedures. Finally, Part V addresses the issues raised by these laws, regulations, and practice, especially due process limitations.

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[13] Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, §202, 100 Stat. 654 (1986)(codified at 42 USC §300h-2(c)(1988)).

[14] *See* 42 USC §300h-2(c)(6)(1988).

[15] Water Quality Act of 1987, Pub. L. No. 100-4, §314(a), 101 Stat. 46 (1987)(codified at 33 USC §1319(g)(1988); Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, §109(a), 100 Stat. 1633 (1986)(codified at 42 USC §9609(a)(1988)); Emergency Preparedness and Community Right-to-Know Act, Pub. L. No. 99-499, §325(b), 100 Stat. 1753 (1986)(codified at 42 USC 11045(b)(1988)).

[16] *Compare* 33 USC §1319(g)(2)(A)(1988) *with* 33 USC §1319(g)(2)(B)(1988)(explicitly mandating non-APA proceedings for Class I penalties); 42 USC §9609(a)(1988) *with* 42 USC §9609(b)(1988)(implicitly providing for non-APA proceedings for Class I penalties); 42 USC §11045(b)(1)(1988) *with* 42 USC §11045(b)(2)(1988)(implicitly providing for non-APA proceedings for Class I penalties).

[17] *See, e.g.*, United States v. Independent Bulk Transport, Inc., 480 F.Supp. 474 (S.D.N.Y. 1979)(Coast Guard assessment of penalties under Federal Water Pollution Control Act).

[18] Oil Pollution Control Act of 1990, Pub. L. No. 101-380, §4301(b)(6), 104 Stat. 51 (1990)(codified at 33 USC §1321(b)(6)(Supp. III 1990); Clean Air Act Amendments of 1990, Pub. L. No. 100-549, §701, 104 Stat. 2672 (1990)(codified at 42 USC §7413(d)(Supp. III 1990).

[19] *See* Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR §305.79-3(c) (1991); Recommendation 72-6, "Civil Money Penalties as a Sanction," 1 CFR §305.72-6 (1991).

[20] *See, e.g.*, Diver, *supra* note 9; Scalia and Goodman, 20 U.C.L.A. L. REV. 899 (1973); Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction By*

This report concludes that the perception that APA proceedings are more costly and time consuming than non-APA penalty proceedings is not supported by adequate evidence. First, the APA adjudication procedures themselves provide a number of means by which to reduce the time and formality of the particular proceedings. Agencies could, by rule, require ALJs to use various time-saving procedures. Second, the evidence suggests that the length of time involved in penalty proceedings is more related to the amount of the penalty involved than to the type of procedure by which it is assessed. Third, it is the rare penalty case that actually goes to a hearing before an ALJ or hearing officer. Virtually all cases are settled rather than tried.

Agencies have also argued that the cost and limited availability of ALJs also justify exempting administrative penalty proceedings from the APA. Given the few cases that actually need to be tried, it is doubtful whether the cost and limited availability of ALJs would have any significant impact. If, however, the only purpose of exempting the administrative penalty proceedings from the APA is to avoid the requirement for ALJs, the exemption need not be total and should include some requirement for assuring the neutrality and fairness of the substitute hearing officer.

Federal Administrative Agencies, in 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896 (1972).

I. The History

Administratively imposed civil penalties are not new to administrative law. For example, as early as 1853, the Supreme Court upheld a Customs-imposed 20 percent penalty duty for an undervaluation of imported goods.[21] The penalty did not rely on judicial enforcement because Customs merely withheld the imported goods until the entire duty was paid. There was even provision for an "administrative appeal" of the alleged undervaluation in a hearing before two "discreet and experienced merchants." Their determination was to be "final and conclusive," which the Court interpreted to mean not subject to review by courts except as to their lawful authority. Despite this early endorsement of administratively imposed penalties, certain legal issues kept administrative penalties relatively controversial.

One such issue involved the question whether or when "civil" penalties are really criminal penalties. The issue is an important one, because if the penalty is "criminal," a host of additional procedural and other protections must be afforded defendants. Indeed, defendants have often claimed that the designation of a penalty as civil is just an attempt to avoid providing the protections otherwise available to them. In probably the best known case on the subject, *Helvering v. Mitchell*,[22] Justice Brandeis approached the issue by asking whether the sanction imposed was criminal or civil in its nature. To answer that question he considered four factors: congressional intent, history of similar provisions, whether a government regulatory or revenue purpose was involved, and whether the penalty was "free of the punitive criminal element."[23] In *Helvering*, Mitchell was accused of fraudulently withholding over $700,000 in taxes, and the IRS assessed a 50 percent penalty of that amount. The Court had little difficulty in determining that the 50 percent penalty was a "civil," not a criminal penalty. Congress had clearly denominated it civil; there was a long history of civil penalties for underpayment of taxes; the penalty was directly involved in the enforcement of the revenue laws; and there was no stigma or moral reprobation in assessing the penalty.

Many have criticized the *Helvering* analysis as insufficiently determinative,[24] but its example of virtually complete deference to the legislative classification of a penalty is consistent with the Court's treatment of the civil/criminal issue both before and after *Helvering*.[25] Moreover, academic efforts to articulate a clear distinction between civil and criminal penalties have not been wholly successful.[26] Nevertheless, the ability to define a penalty as "civil" is critical to its administrative imposition, because it is widely accepted that administrative agencies cannot impose criminal penalties.[27]

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[21] Bartlett v. Kane, 16 How. (57 U.S.) 263 (1853).

[22] 303 U.S. 391 (1938).

[23] *Id.* at 399-402.

[24] *See, e.g.*, McKay, *Sanctions in Motion: The Administrative Process*, 49 IOWA L. REV. 441 (1964). *See also* United States ex rel. Marcus v. Hess, 317 U.S. 537, 554 (1943)(Frankfurter, J., concurring).

A perhaps related question involves the Seventh Amendment's right to a jury trial in cases at common law where the amount in controversy exceeds $20.[28] It was not until 1977 that the Supreme Court decided that whatever the Seventh Amendment required with respect to cases in judicial fora, it did not bar the assignment to an administrative agency of the adjudication of "public rights," including the imposition of money penalties.[29] Thus, agency determination of liability and assessment of money penalties is not subject to the Seventh Amendment, even though, *were the penalty imposed by a court*, the Seventh Amendment would require a jury trial as to liability for civil money penalties (but not of the amount of the penalty to be imposed).[30]

Another legal issue raised in objection to the administrative imposition of civil penalties is the constitutionality of delegating to administrative agencies the legal authority to impose monetary penalties. In *Oceanic Steam Navigation Co. v. Stranahan*,[31] Customs assessed a penalty against a steamship company for bringing diseased aliens to an American port under circumstances where the disease could have been reasonably detected before sailing. The company argued that even if Congress could impose civil penalties for violation of a statutory duty, the collection of the penalty could not be "committed to an administrative officer without the necessity of resorting to the judicial power. [Otherwise,] the distinction between judicial and administrative functions cannot be preserved...."[32] The Court was not persuaded, finding numerous and longstanding examples of administratively imposed sanctions and concluding that where Congress had imposed a statutory penalty, enforcement and collection of that penalty was at least as much an executive as judicial function. A quarter century later in *Lloyd Sabaudo Societas v. Elting,*[33] the Court reaffirmed its conclusion despite a claim that because the penalty here was ten times that in *Oceanic Steam* only judicial imposition of the penalty would suffice.[34]

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[25] *See, e.g.*, Stockwell v. United States, 13 Wall. (80 U.S.) 531 (1871)(100% penalty duty for violating customs law a civil penalty); Ocean Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. United States, 213 U.S. 103 (1909)(no 6th Amendment right in judicial assessment of penalty duty); United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943); United States v. Ward, 448 U.S. 242 (1980). *But see* Lipke v. Lederer, 259 U.S. 557 (1922)(Court characterized as criminal a tax "penalty" of 100 percent the normal rate of tax for the sale of liquor in violation of National Prohibition Act). *Cf.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)(deprivation of citizenship penal in character requiring safeguards of Fifth and Sixth Amendments applicable to criminal trials).

[26] McKay, *supra* note 24; Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 WASH. U. L.Q. 265; Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction By Federal Administrative Agencies*, in 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896 (1972).

[27] *See* Goldschmid, *supra* note 26 at 898; 1 K. Davis, Administrative Law Treatise §2.13 at 133 (1958); McKay, *supra* note 24, at 443-45; B. Schwartz, Administrative Law 89 (1991, 3d Ed.). Characterization of a penalty as civil is also necessary, although not sufficient, to overcome a charge of double jeopardy when the person penalized is also subjected to criminal penalties. *See* United States v. Halper, 109 S.Ct. 1892 (1989).

[28] U.S. Const. amend. VII. The Seventh Amendment provides that "[i]n Suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...."

[29] *See* Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n., 430 U.S. 442 (1977).

[30] Tull v. United States, 107 S.Ct. 1831 (1987).

[31] 214 U.S. 320 (1909).

Finally, there remains the question as to the requirements of due process applicable to penalties imposed by administrative agencies. Here there are no Supreme Court precedents directly on point. Rather, as is the case with other deprivations of property, the three-part test of *Mathews v. Eldridge*[35] should apply.[36]

Given these various questions, despite the Court's general approval of administratively imposed penalties, it is perhaps not surprising that there existed a common prejudice against penalties imposed by administrative agencies. In 1952, for instance, Professor Bernard Schwartz wrote in criticism of a New York law allowing the Superintendent of Insurance to impose money penalties administratively:

> It is difficult to imagine a statutory provision more repugnant to the basic principles upon which our administrative law is grounded. It violates the fundamental rule that the imposition of a money penalty is, with us, a judicial, not an administrative function.[37]

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[32] *Id.* at 338.

[33] 287 U.S. 329 (1932).

[34] In the federal cases, the challenge was to the ability of an agency to determine the liability for the penalty, where the amount of the penalty was set by statute. Some state cases have distinguished between statutory schemes that set a fixed penalty and those that authorize the agency to set the amount of the penalty, finding the latter impermissible. *See, e.g.*, Tite v. State Tax Comm'n., 57 P.2d 734, 741 (Utah 1936); Broadhead v. Monaghan, 117 So. 2d 881 (Miss. 1960); State v. Vines, 164 S.E.2d 161 (N.C. 1968). Federal cases apparently have never recognized this distinction.

[35] 424 U.S. 319 (1976).

[36] *Cf.*, Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477, 1483 (D.C. Cir. 1989)(informal, non-APA adjudicatory hearing for imposing "corrective action orders" satisfies *Mathews v. Eldridge* test).

[37] Schwartz, *1952 Survey of New York Law -- Administrative Law*, 27 N.Y.U.L. REV. 928 (1952). To Professor Schwartz's credit, he was able to reevaluate and later repudiate this conclusion. *See* Schwartz, *1969 Survey of New York Law -- Administrative Law*, 21 SYRACUSE L. REV. 389-90 (1970); B. Schwartz, Administrative Law 88, 96-97 (1991).

In 1965, Professor Jaffe suggested that "[c]onstitutional doubts and scruples aside," "it is a close question whether there is sufficient advantage in conferring the power to fine [on administrative agencies]."[38] He concluded that "[i]f resort to the judiciary is tried and turns out to be clumsy, inefficient, or ineffective, there is then a good case for administrative penalty powers."[39] Even here, however, he counselled that rather than have the agency actually determine liability, it should only make an "apparent liability" finding, which to enforce would require a trial *de novo* in court, thereby "avoiding all constitutional doubts."[40]

This advice accorded with the prevailing congressional practice. Thus, in 1972, when Professor Goldschmid made his report to the Administrative Conference on civil money penalties,[41] he concluded that of the 104 civil penalty provisions he identified, only four involved "true administrative imposition" of penalties.[42] The others required the agency to "be successful in a *de novo* adjudication in a district court (whether or not an administrative proceeding [had] previously occurred) before a civil money penalty [could] be imposed."[43] In order to provide agencies more enforcement flexibility, particularly by avoiding the necessity of obtaining approval of the Department of Justice, and at the same time to enhance fairness, Professor Goldschmid recommended increased use of administratively imposed penalties that would not require *de novo* judicial proceedings to enforce. Rather, persons who wished to contest a penalty would have the opportunity for a hearing under Sections 554, 556, and 557 of the APA.[44] Such adjudications, Professor Goldschmid wrote, should be "just, inexpensive, and speedy."[45] The administrative decision would be final unless appealed within a limited period to a federal court, where the review would be limited to substantial evidence review under the APA.

The Administrative Conference, thereafter, formally adopted a recommendation approving the increased use of civil money penalties as an alternative to criminal penalties and other draconian measures.[46] It also recommended the administrative imposition of those penalties, at least where the penalty amount is small (less than $5000) and is imposed pursuant to a system affording parties an opportunity for a hearing on the record under Sections 554, 556, and 557 of the APA.[47]

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[38] L. Jaffe, Judicial Control of Administrative Action 114 (1965).

[39] *Id.*

[40] *Id.*

[41] *See* Goldschmid, *supra* note 26.

[42] *Id.*, at 908. The four were the Occupational Safety and Health Review Commission, the Immigration and Naturalization Service, the Postal Service, and the Federal Home Loan Bank Board. Professor Goldschmid quotes from testimony by a congressman in opposition to a bill proposing to authorize the Federal Maritime Commission to impose a penalty by administrative procedure alone:

> the legislation your Committee is now considering is *not* routine; is *not* in any sense commonplace or comparable to existing agency powers elsewhere; but would, to the contrary, represent a highly unusual, unprecedented and indeed revolutionary development in administrative law.

Id. at 907, quoting from F. Conger Fawcett, Statement on S. 2138 before the Merchant Marine Subcommittee of the Senate Committee on Commerce, 92d Cong., 1st Sess. 10-11 (1971).

[43] Goldschmid, *supra* note 26, at 907.

[44] *Id.* at 930.

[45] *Id.*

By 1979, when the Administrative Conference next addressed the issue, the number of civil penalty provisions had mushroomed. Professor Diver's report to the Administrative Conference on administrative civil penalties identified 141 "agency-assessment" penalty provisions as well as 207 "court-assessment" provisions.[48] Of these 141 "agency-assessment" provisions, however, Professor Diver believed that not all involved "true administrative imposition" of penalties. Because a "full-scale trial-type hearing [must] be provided before a civil penalty can be exacted,"[49] Professor Diver stated, true administrative imposition of penalties could only occur where those type of hearings were provided by the agency. However, only 27 of the 141 "agency-assessment" provisions provided explicitly for a formal hearing on the record under the Administrative Procedure Act,[50] while only 27 more required an otherwise unspecified notice and a hearing.[51] From this, Professor Diver concluded, most of the so-called administrative assessment provisions, those which did not in fact provide "full-scale trial-type hearings," still implicitly required a *de novo* judicial trial on the merits in order to enforce the administrative penalty determination.[52] His recommendation was that agencies provide the opportunity for a "full-scale trial-type hearing" even when the governing statute did not require it, thereby forestalling the need for a *de novo* judicial trial.[53]

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[46] *See* Recommendation 72-6, "Civil Money Penalties as a Sanction," 1 CFR §305.72-6 (1991).

[47] *Id.*

[48] Diver, *supra* note 9, at 1441.

[49] *Id.* at 1487.

[50] *Id.*

[51] *Id.* at 1443 n.43.

[52] *See id.* at 1485-1489. *See also* Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR §305.79-3(d) (1991). Whether a "full-scale trial-type hearing" was necessary to determine the amount of penalty, as opposed to liability for having violated the law, Diver found unclear. *See* Diver, *supra* note 9, at 1487.

[53] Diver, *supra* note 9, at 1490. In 1986, Senator Cohen published in the Congressional Record a table of statutes authorizing administrative penalties. *See* 132 Cong. Rec. S 13009 (daily ed. September 19, 1986). It indicated 141 separate statutory provisions authorizing administrative penalties. Of these, however, now 69 explicitly require an APA hearing. These involved nine different departments or their subdivisions, as well as ten other independent agencies. Seventy-two provisions did not explicitly require an APA hearing, but 67 of them required a "hearing" and judicial review on the basis of substantial evidence, suggesting perhaps an intent to require formal adjudication. *See, e.g.*, Seacoast AntiPollution League v. Costle, 572 F.2d 872, *cert. denied*, 439 U.S. 824 (1978). It is worthy of note that all of these 67 provisions were enforced by the Coast Guard. Only four provisions did not by their terms require a hearing at all and provided for *de novo* judicial review, while one provision required a "hearing" and *de*

The Administrative Conference affirmed its 1972 recommendation, noting that the "constitutionality and desirability of administratively imposed penalties have been widely recognized."[54] It also called upon Congress to provide expressly for formal adjudication under the APA when a person sought a hearing and for agencies voluntarily to provide such adjudications where the law was silent or unclear on the issue.[55] In this way, the need for a *de novo* judicial trial could be avoided.[56]

Both Professors Goldschmid and Diver seem to have assumed that if a defendant challenged the assessment of a penalty, either the agency had to provide a "full-scale trial-type hearing," as provided by Sections 554, 556, and 557 of the APA, or a court would have to hold a trial *de novo* on liability. The Administrative Conference shared this assumption.[57]

This assumption appears to proceed from equating the procedures of Sections 554, 556, and 557 of the APA with the requirements of due process. That is, if due process required a full-scale hearing, then the procedures of the APA defined the nature of that hearing. There was case law to support such a belief. Probably the most important precedent was *Wong Yang Sung v. McGrath.*[58] There Wong Yang Sung was ordered deported pursuant to a hearing before an "immigrant inspector," a person involved in the investigation and prosecution of deportable aliens, not before an ALJ,[59] as would be required under the APA. The issue was whether the APA applied to the deportation hearing, requiring independent examiners rather than immigrant inspectors. Section 554 by its terms applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[60] No "statute" required a deportation hearing, but the Supreme Court had long held that due process required a hearing in deportation cases.[61] Against this background, the Court deemed the statute providing for deportation, which constitutionally could not be exercised without a

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novo judicial review. Under Professor Diver's analysis, these latter five provisions should not be considered true administrative penalty provisions.

[54] Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR §305.79-3(c) (1991).

[55] *Id.*

[56] *Id.*

[57] *See* Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR §305.79-3(d) (1991)("[some statutes] confer on the agency only a power to 'assess' or to 'mitigate' penalties, thereby expressly or implicitly reserving to the respondent the right to seek a subsequent de novo fact-finding hearing by the court in a collection proceeding").

[58] 339 U.S. 33 (1950).

[59] At the time, the APA provided for "examiners" rather than Administrative Law Judges. Pub. L. No. 404, Ch. 324, §7(a), 60 Stat. 237 (1946).

[60] 5 USC §554(a)(1988).

[61] *See, e.g.*, The Japanese Immigrant Case, 189 U.S. 86 (1903).

due process hearing, to require a hearing, thereby triggering application of the APA.[62]

This interpretation of the APA's language in its early years reflected the Court's view that the "APA represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest."[63] Accordingly, the Court believed it appropriate to read the APA to apply broadly to the wide range of situations that raised the issues that gave rise to the APA provisions. Here, the use of an investigating officer as a hearing officer in deportation cases by the Immigration and Naturalization Service seemed to raise the very problem of combining in one person the prosecutor and the judge, at which some of the provisions of the APA were addressed.[64]

The logical implication of *Wong Yang Sung*, therefore, was that if the Constitution requires a hearing on the record, the APA's provisions should provide the procedures for that hearing.[65] Subsequent Supreme Court cases, however, substantially undercut such an interpretation.

First, in *Marcello v. Bonds*, the Court found that, in light of specific amendments to the immigration laws,[66] the APA did not apply to deportation proceedings, and due process did not prohibit the Immigration and Naturalization Service from using "special inquiry officers" in such proceedings, even though they were to take the role of both prosecutor and judge.[67] *Marcello*, therefore, approves an outcome directly opposite that in *Wong Yang Sung*. Nevertheless, there is nothing inconsistent in their treatments of the APA or due process. *Marcello* does not question that deportation proceedings still must provide hearings that satisfy due process requirements. Nor does it suggest any doubt that in the absence of explicit congressional language the APA is presumed to provide the procedures for those hearings. Because *Wong Yang Sung* was at bottom an issue of statutory interpretation of the APA, there is nothing inconsistent in giving effect to a later specific statute that excepts a due process hearing from the APA procedures. The question then becomes what procedure is required by due process. In *Marcello*, the Court determined that due process did not strictly require a judge who had no role in the prosecution, a determination that the Court has consistently followed.[68]

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[62] Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950).

[63] *Id.* at 40.

[64] *Id.* at 41-42.

[65] *See, e.g.*, Riss & Co. v. United States, 341 U.S. 907 (1951)(per curiam)(denial of ICC certificate of public convenience and necessity requires due process hearing, so APA procedures apply); Cates v. Haderlein, 342 U.S. 804 (1951)(per curiam)(Solicitor General confessed error where Postal Service issued a mail fraud order without giving an APA hearing).

[66] *See* Immigration and Nationality Act of 1952, ch. 477, §242, 66 Stat. 280 (1952).

[67] 349 U.S. 302 (1955).

Second, in *United States v. Florida East Coast Railway Co.*,[69] the Court interpreted restrictively the APA phrase, "required by statute to be determined on the record after an opportunity for an agency hearing," so that a statute requiring a "hearing" prior to adoption of a rule did not trigger the formal hearing requirements of the APA. While *Florida East Coast Railway* is easily distinguishable from *Wong Yang Sung* because it dealt with rulemaking rather than adjudications, much less adjudications requiring provision of "due process" procedures, its thrust of restricting the application of the APA provisions in light of practical concerns and in contrast with historical understandings[70] is in tension with the tendency of *Wong Yang Sung* to apply the APA provisions in circumstances of doubt. Some courts, moreover, have looked to *Florida East Coast Railway* for guidance in determining when adjudicatory hearings required by statute trigger the APA's formal adjudication procedures,[71] and the Supreme Court has never ruled on the issue of when an adjudicatory hearing required by statute triggers the APA.

Third and most importantly, in *Mathews v. Eldridge*,[72] the Court adopted a specific balancing test for determining what process is due; it did not presume that the APA was the applicable procedure once it decided that due process was required. Professor Diver argues that *Mathews* is not inconsistent with the notion that a full-scale trial-type hearing is required in penalty cases,[73] and presumably that the APA specifies the procedures for this full-scale trial-type hearing. This is so, he says, because *Mathews* and most of the cases applying it involve a question of the adequacy of pretermination hearings when full-scale trial-type post-termination hearings were available later.[74] Thus, the issue was really one of timing rather than the availability of a full-scale trial-type hearing. Nevertheless, as he concedes, the Court has approved less than formal adjudication procedures even when there is neither a subsequent full-scale trial-type administrative proceeding nor a trial *de novo* in court.[75] While each of these instances may be characterized as "peculiar,"[76] they are numerous and diverse enough to support the conclusion that they are the result of a *Mathews*-type balancing approach, not that they are exceptions to a general rule.

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[68] *See, e.g.*, Withrow v. Larkin, 421 U.S. 35 (1975).

[69] 410 U.S. 224 (1973).

[70] *Id.* at 246 (Douglas dissenting); Attorney General's Manual on the Administrative Procedure Act, quoted in W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF, R. SCHOTLAND, ADMINISTRATIVE LAW 238-239 (8th Ed. 1987); Long Island R. Co. v. United States, 318 F. Supp. 490 (E.D.N.Y. 1970)(three judge court)(Friendly, J.), *rev'd sub nom.* United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973).

[71] *See, e.g.*, United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519 (DC Cir 1978).

[72] 424 U.S. 319 (1976).

[73] *See* Diver, *supra* note 9, at 1487 n.277.

[74] *Id.*

[75] *See, e.g.*, Hewitt v. Helms, 459 U.S. 460 (1983)(prisoner placed in solitary confinement); Schweiker v. McClure, 456 U.S. 188 (1982)(denials of Medicare Part B claims); Board of Curators v.

Moreover, a flexible notion of the procedures dictated when due process is required accords with both the judicial evolution of due process law and scholarly commentary. As the Court expanded the universe of government actions that required due process, it inevitably created a strain on the historical notion of what constituted due process. Perhaps nothing illustrates the development better than the devolution of "rudimentary due process" providing "minimum procedural safeguards"[77] from the extensive protections afforded in 1970 in *Goldberg v. Kelly*[78] to the procedures afforded a suspended public school student in 1975: oral notice, an explanation of evidence against him, and an opportunity to present his side of the story. Judge Henry Friendly probably best articulated the felt necessity to develop a balancing approach to determine the appropriate procedure in his celebrated article, *Some Kind of Hearing*.[79]

In any case, the inexorable development of a balancing approach to determine the procedure required by due process for different kinds of proceedings has displaced the simple presumption of *Wong Yang Sung* that APA procedures define the due process procedures. Indeed, more recent commentators observe that "[i]n federal due process cases, ... the APA is rarely consulted as a source of governing procedure."[80]

Perhaps Professor Diver's and the Administrative Conference's assumption that administrative penalty proceedings would be conducted pursuant to the APA stemmed from a belief that the statutes authorizing the administrative penalties triggered, or at least should trigger, the formal adjudication provisions of the APA. For example, the original Federal Water Pollution Control Act of 1972 (FWPCA)[81] authorized both the Coast Guard and EPA to assess a civil penalty not to exceed $5000, the Coast Guard against persons discharging oil or hazardous substances in navigable waters and EPA against other persons who violated regulations adopted to prevent and clean up spills of oil or hazardous substances.[82] The statute specified that no penalty was to be assessed unless the

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Horowitz, 435 U.S. 78 (1978)(academic dismissal of medical student); Ingraham v. Wright, 430 U.S. 651 (1977)(corporal punishment of school children); Palmigiano v. Baxter, 425 U.S. 308 (1976)(prison disciplinary hearings); Goss v. Lopez, 419 U.S. 565 (1975)(suspension of school children from school); Wolff v. McDonnell, 418 U.S. 539 (1974) (deprivation of prisoner's "good time" credits).

[76] Diver, *supra* note 9, at 1487 n.277.

[77] Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

[78] *Id.*

[79] Friendly, *Some Kind of Hearing*, 123 U.PA. L. REV. 1267 (1975).

[80] W. Gellhorn, *et al.*, *supra* note 70, at 247.

[81] Pub. L. No. 92-500, 86 Stat. 862 (1972).

[82] 33 USC §1321(b)(6)(1988)(Coast Guard); 33 USC §1321(j)(2)(1988)(EPA).

person charged "shall have been given notice and opportunity for hearing on such charge."[83] The question naturally arises, therefore, whether this language mandates use of Section 554, which applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[84]

Neither the Coast Guard nor EPA believed the language required an APA hearing. Both provided only an informal procedure without an administrative law judge.[85] In its preamble, EPA made clear that it viewed the informal procedure adequate "since full de novo trials in the United States District Court are available to alleged violators upon request."[86] It is not clear whether the Coast Guard took this position. The history is inconsistent. The legislative history of the FWPCA suggests that normal Coast Guard practice was to use informal penalty procedures, but that collection proceedings in court would be a *de novo* hearing.[87] In some cases brought under the FWPCA, the Coast Guard either brought or acquiesced in *de novo* collection proceedings.[88] In other cases, however, courts reviewed the Coast Guard's penalty assessment on the record under substantial evidence or "arbitrary and capricious" review, denying claims of a right to a *de novo* hearing or review.[89] When the issue was raised, the courts were also split as to whether the FWPCA's language required an APA hearing or merely an informal hearing.[90] A constitutional due process challenge to the informal hearing was rejected.[91] Despite this uncertain background, however, the Coast Guard continues to proceed informally for virtually all of its many administrative penalties.[92]

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[83] *Id.*

[84] 5 USC §554(a) (1988).

[85] *See* 43 Fed. Reg. 54186 (1978); 33 CFR Subpart 1.07 (1978)(Coast Guard). 39 Fed. Reg. 31602 (1974); 40 CFR Part 114 (1992).

[86] 39 Fed. Reg. 31602 (1974).

[87] *See* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 117-118 (1972) ("[T]he respondent has the opportunity of a de novo hearing in any collection proceeding initiated by a United States Attorney after the conclusion of the administrative procedures. The net result is to parallel the penalty assessment method which the Coast Guard has used in the past in connection with laws which it administers.").

[88] *See* United States v. Malitovsky Cooperage Co., 472 F.Supp. 454 (W.D. Pa. 1979); United States v. General Motors, 403 F.Supp 1151 (D. Conn. 1975). *See also* United States v. Delian Cruises, 505 F.Supp. 79 (E.D. La. 1980)(holding over Coast Guard objection that *de novo* review is available).

[89] *See* United States v. Healy Tibbitts Constr. Co., 713 F.2d 1469 (9th Cir. 1983); Commonwealth of Puerto Rico v. S.S. Zoe Colocatroni, 456 F.Supp. 1327 (D.P.R. 1978); Matter of Vest Transp. Co., 434 F.Supp. 748 (N.D. Miss. 1977). *See also* United States v. Atlantic Richfield, 429 F.Supp. 830 (E.D. Pa. 1977), *aff'd* 429 F.2d 1303 (3d Cir. 1978).

[90] *See* United States v. Independent Bulk Transport, Inc., 480 F.Supp. 474 (S.D.N.Y. 1979)(APA does not apply); United States v. Healy Tibbitts Constr. Co., 713 F.2d 1469, 1476 n.6 (9th Cir. 1983)(APA would apply -- dictum).

[91] *See, e.g.*, United States v. Chotin Trans. Co., 649 F. Supp. 356 (S.D. Oh. 1986).

[92] *See* 33 CFR Subpart 1.07 (1991). In April 1993, the Coast Guard adopted an interim final rule to establish procedures for implementing the Class II administrative penalty authority it shares with EPA

To conclude that Professor Diver and the Administrative Conference were in error to assume that true administrative penalties could only be imposed using the formal procedures of Sections 554, 556, and 557 of the APA is not to determine what the constitutionally required procedures might be. For this, the *Mathews v. Eldridge* calculus must be used. In *Mathews*, the Court identified three factors which should determine the procedures required.[93] The first factor is the private interest affected by the government action; the greater or more significant the interest, the more procedures the private person should be able to invoke. The second factor is the risk of erroneous decision under the procedures used and the likelihood that more procedures would reduce that risk. This factor reflects the context in which most cases arise — as challenges by a person asserting that the procedures used were inadequate. This factor, therefore, attempts to measure the marginal utility of additional procedures. The third factor is the Government's interest in avoiding additional procedures. That interest is usually expressed in terms of time, money, and efficient administration of the government program.

Applied to civil penalties, the private interest is primarily money, or the amount of the penalty. This can vary to extreme degrees. Thus, the maximum civil penalty for the failure to file certain manifests with Customs is $20.[94] At the same time, the maximum civil penalty for certain banking violations is $1,000,000.[95] Moreover, the impact of a given penalty amount may differ significantly depending on the nature of the financial circumstances of the defendant. Accordingly, for purposes of *Mathews*, the weight of the first factor may vary greatly.[96]

With respect to the second *Mathews* factor, the risk of an erroneous determination and the likelihood additional procedures would reduce that risk, the focus is on the contested facts. Absent contested facts, the procedures applicable to trial-like proceedings are generally inappropriate.[97] In

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under Section 109(b) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC §9609(b) (1988), and Section 111(b) of the Clean Water Act, 33 USC §1321(b) (Supp. III 1990). *See* 58 Fed. Reg. 17926 (1993). These procedures provide for APA hearings in assessing the Class II penalties. EPA continued to use its Part 114 procedures until 1992, when as a result of amendments to 33 USC §1321(b) made by the Oil Pollution Control Act of 1990, *see supra* note 18, it announced that it would use its 40 CFR Part 22 procedures for the new Class II penalties and its proposed 40 CFR Part 28 procedures for the new Class I penalties. *See* 57 Fed. Reg. 52704 (1992).

[93] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[94] *See* 19 USC §292 (1988)(assessed in judicial proceeding).

[95] *See* 12 USC §1833a(b)(1)(1988)(assessed in judicial proceeding).

[96] There is undoubtedly some stigma attached to assessment of a civil penalty of any amount, but it is not considered of the same nature as that of a "criminal" sanction. Presumably, it would marginally increase the private interest in more procedures.

[97] *See, e.g.*, R. PIERCE, S. SHAPIRO, P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 245 (2d ed. 1992). This black-letter rule arose in the environment of the then extant understanding that courts reviewed questions of law *de novo*. Accordingly, there was no need for an administrative hearing on questions of law. Subsequent to *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984), however, the Court has

administrative penalty assessments, contested facts may be of two kinds: those related to liability (i.e., whether or not the defendant committed the acts charged) and those related to the amount of the penalty (i.e., facts relevant to setting the actual dollar amount of the penalty).[98] As *Mathews* explained, however, the accurate determination of contested facts is not always aided by trial-like procedures.[99] Scientific, financial, and business information is often better proved through paper exchange than trial procedure with testimony and cross-examination. Even where trial-like procedures may increase reliability of determinations, the degree of increase may not be significant. Given the wide variety of administrative penalty provisions, the nature of the facts likely to be contested is apt to differ from provision to provision, if not from case to case. This suggests that little can be said in general about the weight to be given to the second *Mathews* factor in penalty cases.

The cost to the Government, the third *Mathews* factor, is generally a function of the number of the type of cases the Government processes as well as the complexity of each. Thus, the extensive procedural protections provided welfare recipients in *Goldberg* were a burden to government because of the number of cases involved.[100] Consequently, "mass justice" cases have been prime candidates for less than full trial-type procedures. Moreover, as cases increase in complexity, it may be that the costs of trial-type procedures increase substantially. For example, if expert witnesses are necessary, their costs can be phenomenal, or if program officers need to be involved in the particular cases, the ongoing functioning of the government programs may be substantially burdened. Penalty cases run the gamut. While few penalty provisions are likely to involve the volume of Social Security or welfare cases, the trend in Federal enforcement is to authorize inspectors to assess smaller penalties.[101] Many cases involve little or no factual dispute, such as when the defendant self-reports the violation. At the same time, some cases may involve highly complex factual questions involving

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recognized that agencies may in the course of an administrative proceeding interpret law which in effect binds courts. If this is so, it is at least arguable that due process should require a hearing on such legal questions as well. Obviously, the procedures incident to a right to a "hearing" on legal questions would be different from and undoubtedly less trial-like than a right to a hearing on factual issues.

[98] *See, e.g.*, 42 USC 9609(a)(3)(1988)("In determining the amount of any penalty assessed [for violations of requirements of the Comprehensive Environmental Response, Compensation and Liability Act], the President shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.").

[99] Mathews v. Eldridge, 424 U.S. 319, 343-44 (1976).

[100] *See especially* Mashaw, *The Management Side of Due Process: Accuracy, Fairness and Timeliness in Adjudication of Social Welfare Claims*, 59 CORN. L. REV. 772 (1974).

[101] *See, e.g.*, 42 USC §7413(d)(3)(Supp. III 1990)("field citations" of up to $5000 may be assessed for violations of the Clean Air Act subject to an opportunity for a non-APA hearing to contest the citation).

engineering or scientific data. Thus, again it is not possible to generalize about the cost to the government of additional procedures in penalty cases, other than to say that they would increase the cost to some degree.

The need for speed in the adjudication is sometimes a relevant government consideration, for example, where the public health or safety might be endangered. This consideration, however, would not seem applicable to penalty determinations.

Many have criticized the *Mathews* factors because of their indeterminancy.[102] As one treatise says, "it is difficult to predict the precise result of application of the *Mathews* test to a class of disputes until the Court decides a case within that class."[103] Moreover, as that treatise suggests, this indeterminancy leads courts generally to defer to legislative or administrative determinations of adequate procedural safeguards where the legislature or agency has acted in good faith.[104] Consequently, in deciding what are the appropriate procedures for assessing a particular set of administrative penalties, agencies are probably best advised to be sensitive to the *Mathews* factors in light of the size of the penalties involved and the nature of the likely type of violations and penalty considerations involved.

Such advice would be consistent with the limited judicial treatment of informal procedures for assessing penalties prior to 1986. Thus, in the cases brought under the oil spill provisions of the Federal Water Pollution Control Act,[105] the courts have considered Congress' perceived determination that, in light of the relative simplicity of the factual issues likely to be involved, the procedures should be "expeditious and free from the procedural complexities of the APA"[106] and that trial-type procedures are better "reserved for the more factually complex and higher liability actions"[107] as well as for those actions which have greater impacts on the public.[108]

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[102] *See, e.g.*, R. PIERCE, S. SHAPIRO, P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS, *supra* note 97, at 249-251.

[103] *Id.* at 250.

[104] *Id.*

[105] *See supra* note 82.

[106] United States v. Independent Bulk Trans., Inc., 480 F.Supp. 474, 481 (S.D.N.Y. 1979).

[107] *Id.*

[108] *See id. See also* Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989)(upholding EPA's informal adjudicatory procedures for "corrective action" orders against a facial due process attack but noting that "the absence of formal safeguards could prove troublesome" in a particular case where there were both high stakes and issues for which trial-type procedures would be important).

II. The Statutes

Consistent with the Administrative Conference's recommendations to Congress to make greater use of administrative penalties as a means of enforcing regulatory provisions,[109] new regulatory provisions increasingly included administrative penalty provisions. Yet, early on, Congress expressed concern about the time and complexity associated with formal adjudication. For example, the legislative history of the penalty assessment provision in the original Federal Water Pollution Control Act[110] explained that:

> [t]he language "notice and opportunity for a hearing"...is not intended to impose in every instance the complex procedural requirements associated with formal adjudicatory hearings on the record before a hearing examiner.... The committee believes that effective administrative enforcement will be enhanced by assessment procedures which are expeditious.[111]

Nevertheless, the statutory language used was ambiguous, requiring "notice and an opportunity for a hearing,"[112] resulting in litigation over whether a formal, APA adjudication was required[113] and, if not, whether *de novo* judicial review was required.[114]

A decade later, EPA was to have much the same problem with respect to amendments to the Resource, Conservation, and Recovery Act[115] (RCRA). In the Hazardous and Solid Waste Amendments of 1984,[116] Congress authorized EPA to order "corrective action" whenever it determined that an "interim status facility" had released or was about to release hazardous waste into the environment.[117] If a defendant requested a "public hearing," the corrective action order could only be final after the hearing.[118] Again, whether Congress intended this hearing requirement to invoke the APA's formal adjudication requirements was unclear, but EPA took the position that it did not. The DC Circuit upheld EPA's conclusion, relying on *Chevron* deference[119] to the agency's interpretation of the statutory language.[120]

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[109] Recommendation 72-6, "Civil Money Penalties as a Sanction," 1 CFR §305.72-6 (1991); Recommendation 79-3, Agency Assessment and Mitigation of Civil Money Penalties, 1 CFR §305.79-3 (1991).

[110] 33 USC §1321(b)(6), (j)(2) (Supp. III 1990).

[111] H.R. Rep. No. 92-911, 1972 U.S.Code Cong. & Admin. News at 3668. The report went on to explain that defendants' rights would be protected by the APA because they would have "the opportunity for a de novo hearing in any collection proceeding initiated by the United States Attorney after the conclusion of the administrative procedures." *Id.* It is this latter statement that was ignored by the Coast Guard and EPA and by most of the courts that addressed the procedures for assessing oil spill penalties. *See particularly* United States v. Independent Bulk Transport Inc., 480 F.Supp at 479 (court leaves out sentence on *de novo* review, while quoting the three sentences before it and the sentence after it).

[112] 33 USC §1321(j)(2) (Supp. III 1990). *See also* 33 USC §1321(b)(6) (Supp. III 1990).

[113] *See, e.g.*, United States v. Healy Tibbitts Construction Co., 713 F.2d 1469 (9th Cir. 1983).

[114] *See, e.g.*, United States v. Delian Cruises, 505 F.Supp. 79 (E.D. La. 1980).

[115] 42 USC §6901 *et seq.*(1988).

[116] Pub. L. No. 98-616, 98 Stat. 3256 (1984).

[117] 42 USC § 6928(h)(1) (1988).

Given the costs of the statutory ambiguity in the applicable procedures to be afforded, as well as the general judicial approval of informal procedures for penalty assessments, it is not surprising that EPA began to suggest specific language to Congress that would authorize administrative penalties without the necessity of formal adjudication. This was apparently first done in 1982 in the Administration's bill to reauthorize the Clean Water Act.[121] EPA explained that its proposed amendment would authorize EPA to assess civil penalties up to $10,000 a day and up to $75,000 maximum after an informal proceeding, which could be reviewed in court in an appellate manner, not *de novo*.[122] This, it was stated, would be a new, needed enforcement tool, because under the then existing law, while EPA could issue administrative orders to comply with the law, it could assess penalties only through judicial civil actions.[123] EPA explained in detail the extensive procedural steps involved in judicial proceedings, suggesting that these cases could take protracted periods of time.[124] EPA also indicated that in order to go to court, EPA must refer the case to the Department of Justice, which actually would bring the action.[125] Although nothing more was made of this referral requirement in the testimony and documents provided Congress, the burden of obtaining Department of Justice approval was viewed by many within EPA as substantial and resulted in fewer penalty cases being brought, especially where the amount of the monetary penalty would not be substantial.[126] In contrast, EPA noted, administrative proceedings would be quicker and simpler.[127] While the proposed statutory language explicitly ruled out any requirement for formal adjudication under the APA, the testimony did not distinguish between formal and informal procedures, except to note that the Coast Guard was using informal hearings under Section 311 of the Act.[128] Instead, EPA referred generally to a hearing before "a neutral hearing officer," which would assure due process and provide a hearing record for judicial review.[129]

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[118] 42 USC § 6928(b) (1988).

[119] *See* Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984).

[120] *See* Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989).

[121] *See* S. 2652, 97th Cong., 2d Sess. § 8 (1982).

[122] *See Hearings before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works*, 97th Cong., 2d Sess. 78, (1982)(hereinafter *Senate Hearings*)(statement of Dr. John W. Hernandez, Jr., Deputy Administrator, EPA).

[123] *Id.* at 78-79, 174.

[124] *Id.* at 79-80.

[125] *See id.* at 79.

[126] *See id.* at 174 ("the threat of judicial action is not a realistic deterrent since cases with small proposed penalties must often wait to be filed, because these smaller cases are assigned lower enforcement priority."). *See also* Goldschmid, *supra* note 26, at 900 ("the Department of Justice presents an immovable roadblock; we cannot get our cases into court").

[127] *See Senate Hearings, supra* note 122, at 80.

The Natural Resources Defense Council (NRDC) was the only outside group to comment on the provision in the bill. While characterizing it as "non-controversial,"[130] NRDC warned that the administrative penalty procedure should not interfere with citizens' suits, be used to slap the wrist of major violators, or result in frittering away EPA resources "through endless administrative hearings and appeals."[131] EPA had already indicated that it would not use this new administrative penalty procedure for major violations or complex cases. Rather, EPA's intent was to use the procedure only for "clear and well documented violations of the Act that may not be serious enough to require judicial enforcement."[132]

The Congress' response was not immediately to adopt EPA's suggestion. Thus, a subsequent bill from the Senate Committee on Environment and Public Works provided an informal proceeding but required *de novo* judicial review of the determination.[133] In the House, subsequent bills gave EPA the authority to assess civil penalties administratively, but only after a formal APA proceeding.[134] By 1985, however, the Senate had come around to EPA's position, providing explicitly for an informal hearing and judicial review of a finding of violation on the basis of substantial evidence in the record and of the amount of the penalty on the basis of whether it was an abuse of discretion.[135] The Senate Report went on at some length to describe and justify these new provisions.[136]

First, the committee accepted the need for a penalty procedure that could be used more expeditiously and cheaply than judicially assessed penalties. Thus, the committee believed the addition of this procedure would increase the total number of enforcement actions.[137] Second, the committee indicated its agreement that this new procedure should be used for "the less complex cases," "where violations are straightforward, self-reported and likely uncontested by the violator," because these violations are "clearly documented and easily corrected."[138] Third, given the nature of the expected violations, the committee believed that the procedures for determining the violation and assessing the penalty should be "as flexible and unencumbered by procedural complexities as possible, consistent with due process considerations."[139] Finally, the committee responded to NRDC's concerns by making specific provisions to deal with the interplay of citizen enforcement suits and administrative assessment of penalties[140] and by providing for public oversight of the penalty assessments through public notice-and-comment procedures.[141]

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[128] *See id.* at 80-81.

[129] *See id.* at 81, 174.

[130] *See id.* at 237.

[131] *Id.* at 281.

[132] *Id.* at 81.

[133] *See* S. Rep. No. 98-233, 98th Cong., 1st Sess. 20 (1983).

[134] *See* H.R. Rep. No. 98-827, 98th Cong., 2d Sess. 32 (1984).

[135] *See* S. Rep. No. 99-50, 99th Cong. 1st Sess. 27-28 (1985).

[136] *See id.* at 26-29.

[137] *See id.* at 26.

At approximately the same time, Congress was also considering a reauthorization bill for the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[142] and amendments to the Safe Drinking Water Act.[143] In the House bills to reauthorize and make certain amendments to CERCLA, administrative penalties could only be imposed pursuant to formal adjudication under the APA.[144] EPA objected to this approach, stating that such procedures were "lengthy and laborious" and would "require creation of a new layer of bureaucracy."[145] Rather, EPA suggested the provision in the administration bill that only required notice and a hearing before assessing an administrative penalty,[146] which had already been accepted by the relevant Senate committee without comment.[147] The conference committee adopted both approaches, again without explanation, allowing informal adjudication for penalties of not more than $25,000 per violation, denominated Class I Administrative Penalties, but requiring formal adjudication for penalties over that amount but up to $25,000 per day for each day of violation, denominated Class II Administrative Penalties.[148] Inasmuch as EPA had consistently indicated its desire to use informal proceedings for "relatively small penalty cases and minor violations,"[149] this solution directly responded to its desires.

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[138] *Id.* at 27.

[139] *Id.*

[140] *See id.* at 28.

[141] *Id.* at 27.

[142] Pub. L. No. 96-510, 94 Stat. 2767 (1980)(codified at 42 USC §§9601 *et seq.* (1988)).

[143] Pub. L. No. 93-523, 88 Stat. 1660 (1974)(codified at 42 USC §§1401 *et. seq.* (1988)).

[144] *See, e.g.*, H.R. Rep. No. 99-253, Part 5, 99th Cong., 1st Sess. 10, 77 (1985)(requiring the procedure used in the Toxic Substances Control Act, which requires the APA's formal adjudication, *see* 15 USC §2615 (1988)); H.R. Rep. No. 99-253, Part 5, 99th Cong., 1st Sess. 19-20, 173 (1985).

[145] *Superfund Reauthorization: Judicial and Legal Issues, Oversight Hearings before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee*, 99th Cong., 1st Sess. 64 (1985)(hereinafter *Oversight Hearings*).

[146] *Id.*

[147] *See* S. Rep. No. 99-11, 99th Cong., 1st Sess. 8, 81 (1985).

[148] *See* H.R. Rep. No. 99-962, 99th Cong., 2d Sess. 22-23, 207 (1986). *See also* 42 USC §9609 (1988). As part of the Superfund Amendment and Reauthorization Act, Congress also enacted the Emergency Planning and Community Right-to-Know Act (EPCRA), Pub. L. No. 99-499, Title III, 100 Stat. 1729 (1986)(codified at 42 USC §11001 *et seq.*(1988)). As enacted, EPCRA also contains a two-tier administrative penalty scheme. *See* Section 325(b), 42 USC §11045(b)(1988). It was added in the

Much the same scene was being played out with respect to the Safe Drinking Water Act Amendments. While the House was adding administrative penalty provisions requiring formal adjudication to EPA's enforcement arsenal under the Act,[150] the Senate was providing informal procedures for administrative penalties virtually identical to those in its bill to amend the Clean Water Act.[151] Indeed, the Senate Environment and Public Works Committee reported the Safe Drinking Water Act amendments and the Clean Water Act amendments within a day of each other, and language from one report explaining and justifying the informal penalty procedures was cribbed from the other.[152] The conference committee on the Safe Drinking Water Amendments adopted the Senate provision with respect to the so-called Underground Injection Control program, providing informal procedures for assessing administrative penalties up to $125,000.[153]

The bills to amend the Clean Water Act, although having started earlier, were delayed and were the last to be considered. The conference committee followed the lead of the conference committee on the CERCLA amendments, creating a two-tier administrative penalty system, with Class I penalties up to $25,000 imposed without formal adjudication and Class II penalties up to $125,000 imposed only after formal adjudication.[154] In addition, the same administrative penalty authority was given to the Secretary of the Army to enforce Section 404 of the Clean Water Act.[155] These provisions became part of the Water Quality Act of 1987.[156]

Subsequent environmental statutes reflect this trend. Thus, the Oil Pollution Act of 1990 revised the administrative penalty provisions relating to discharges of

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Conference Committee, *see* H.R. Rep. No. 99-962, 99th Cong., 2d Sess. 308-309 (1986), as a combination of the House version, which required judicial proceedings to assess civil penalties, *see* H.R. Rep. No. 99-253, Part I, 99th Cong., 1st Sess. 115-116 (1985), and the Senate version, which, because there EPCRA was merely part of CERCLA, only required informal procedures for administrative penalties, *see* S. Rep. No. 99-11, 99th Cong., 1st Sess. 10 (1985).

[149] *Oversight Hearings*, *supra* note 145, at 65.

[150] *See* H.R. Rep. No. 99-168, 99th Cong., 1st Sess. 5, 8, 27, 31 (1985).

[151] *See* S. Rep. No. 99-56, 99th Cong., 1st Sess. 17-18 (1985).

[152] *Compare* S. Rep. No. 99-50, 99th Cong., 1st Sess. 26-27 (1985) *with* S. Rep. No. 99-56, 99th Cong., 1st Sess. 17-18 (1985).

[153] *See* H.R. Rep. No. 99-575, 99th Cong., 2d Sess. 15 (1986). *See also* 42 USC §300h-2(c) (1988).

[154] *See* H.R. Rep. No. 99-1004, 99th Cong., 2d Sess. 138-139 (1986). *See also* 33 USC §1319(g) (1988).

[155] *See* H.R. Rep. No. 99-1004, 99th Cong., 2d Sess 138-139 (1986). *See also* 33 USC §1319(g) (1988).

[156] *See* Pub.L. No. 100-4, §314, 101 Stat. 46 (1987).

oil or hazardous substances into the navigable waters.[157] In place of the previous, uniform but ambiguous requirement for "notice and opportunity for a hearing" before assessing a penalty not to exceed $5,000, with judicial actions for any larger amount, Congress generally copied the two-tier administrative penalty procedure applicable to the enforcement provisions of the rest of the Clean Water Act.[158] Similarly, the Clean Air Act Amendments of 1990 added a two-tier administrative penalty authority to EPA's enforcement arsenal: a formal APA penalty procedure with penalties up to $25,000 per day, not to exceed $200,000 per violation, and an informal, "field citation" program, with penalties up to $5,000 per day.[159]

This legislative history reveals a number of purposes behind these administrative penalty procedures. The Administrative Conference had recommended increased authorization of administrative penalties, in contrast to the existing judicially imposed penalties. Its purpose had been twofold: to expedite and facilitate enforcement, but at the same time to increase fairness to defendants. The two went hand-in-hand, because the cost and time involved in judicial proceedings first provided significant disincentives to agencies' use of these penalty provisions and second created substantial disincentives to defendants to contest a case. As a result, defendants would almost always settle the case, even if they believed they had a legitimate defense. The Conference expected that the use of administrative penalties would enable agencies to use penalties more effectively in their enforcement programs, while at the same time affording defendants a more cost-effective forum in which to contest a case. The Conference's recommendation presumed that the administrative penalty procedure would be formal adjudication under the APA. Nevertheless, these formal proceedings were seen as much less cumbersome, time-consuming and expensive than judicial proceedings. The fact that agencies would no longer need to obtain Justice Department approval was no small part of this increased efficiency.

EPA, however, argued to Congress that formal adjudication procedures were themselves too "lengthy and laborious."[160] EPA cited no figures or particular experience to justify this conclusion, but members of Congress have heard many complaints about long, involved formal administrative proceedings, and it is true that the procedures for formal adjudication do not emphasize, much less guarantee, expeditious case-handling. Consequently, it is not surprising that

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[157] *See* 33 USC §1321(b)(6)(Supp. III 1990).

[158] *Compare* 33 USC §1321(b)(6)(Supp. III 1990) *with* 33 USC §1309(g)(1988). *See also* H.R. Rep. No. 101-653, 101st Cong., 2d Sess. 153 (1990).

[159] *See* Pub.L. No. 101-549, §701, 104 Stat. 2672 (1990)(codified at 42 USC §7413(d)(Supp. III 1990)).

[160] *See Oversight Hearings, supra* note 145.

EPA's argument found sympathetic ears in Congress. In addition, EPA argued that formal, APA adjudication would "require creation of a new layer of bureaucracy."[161] What EPA meant by this is not entirely clear, but it apparently referred to the need for ALJs in formal adjudications. How a handful of ALJs could be considered "a new layer of bureaucracy" is not self-evident, but this reference seems to reflect a deep-seated, negative perception of ALJs as a group shared by a number of EPA personnel involved in the enforcement program. ALJs were perceived as having no interest in expediting cases, minimizing costs, or facilitating resolution. Moreover, these personnel believe the independence afforded ALJs make it virtually impossible for the agency to alter whatever culture exists among ALJs to afford maximum procedural rights, rather than balance the cost and time of particular procedures against the need.[162]

Nevertheless, Congress did not generally provide for exclusively informal procedures. Instead, the informal proceedings are part of a two-tiered system of administrative penalties, plus provision for judicial imposition of civil penalties.[163] Generally, these are rationally tiered, so that the lowest penalty amount can be assessed informally, a higher amount in a formal adjudication, and a still higher amount in a judicial proceeding.[164] This tiering was responsive to EPA's representation that the informal penalty procedures were to be used for the less complex cases, where the factual issues and compliance questions would be straight-forward, and where the nature of the violation was less serious. Absent such facilitation, EPA had suggested, these cases simply would not be brought because they would be too time and resource intensive to justify, given their relatively minor nature. EPA represented that the more serious cases would still be brought judicially, or at least through more formal adjudication.

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[161] *Id.*

[162] In the course of separate interviews with EPA enforcement officials involved in the administrative penalty program, I was told of "horror stories" involving ALJs. When, however, I asked for specifics, the speakers admitted they were referring to what others had said. Whatever the facts, there is clearly a perception by EPA officials involved in enforcement that ALJs are responsible for "long and frustratingly inefficient proceedings." It is, therefore, not surprising that EPA has in recent years sought to have all new administrative penalties imposed through non-APA procedures, *see* text *supra* at notes 122, 145, 151, and even to remove some remedial order proceedings from APA procedures, *see* Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989)(regulations requiring only informal hearings for imposing "corrective action orders" under the Resource Conservation and Recovery Act).

[163] The exception is the provision in the Safe Drinking Water Act, 42 USC §300h-2(c)(1988).

[164] *See* 33 USC §1319(d) & (g)(1988); 33 USC §1321(b)(6) & (7)(Supp. III 1990); 42 USC §7413(b) & (d)(Supp. III 1990); 42 USC §9609(a)-(c)(1988)(judicial assessment at same level as formal adjudication); 42 USC §11045(b)(1988) (judicial assessment at same level as formal adjudication).

III. The Implementation

The 1986/87 legislation empowered two agencies to assess administrative penalties without using APA procedures: EPA and the Army Corps of Engineers. The 1990 legislation added the Coast Guard. EPA, within months of the passage of the Water Quality Act of 1987, published guidance in the Federal Register, which amounted to rules of procedure governing the Class I informal penalty assessments.[165] That guidance announced "the expectation that EPA will later notice [the procedures] for proposed rulemaking."[166] However, it was not until 1991 that EPA in fact proposed rules to implement all of its various informal penalty programs other than the Clean Air Act field citation program.[167] These proposed rules were to be field-tested for a year before EPA would adopt final rules.[168]

The Corps, while it initially took longer to act, then proceeded with dispatch. The Corps issued a proposed rule in 1989,[169] and later the same year it issued a final rule.[170] The rule adopted procedures governing the Corps assessment of administrative penalties for violations of permits issued under Section 404 of the Clean Water Act.[171]

The Coast Guard, as discussed earlier, had used informal penalty procedures under the original FWPCA with its ambiguous administrative penalty procedures. In 1978, the Coast Guard adopted rules to govern all its penalty assessments, not just those under the FWPCA.[172] These rules established an informal proceeding for assessing all penalties. The Oil Pollution Act of 1990, however, amended the FWPCA framework, creating the two-tier system of Class I and Class II administrative penalties.[173] The Class I penalties were potentially larger than the old FWPCA penalties and were explicitly to be assessed in an informal proceeding. The Class II penalties were potentially larger yet, but they required formal adjudication under the APA. The Coast Guard took no action to change its penalty procedures to include Class II penalties until March 1993, when it adopted an interim final rule establishing formal, APA procedures for these Class II penalty proceedings.[174]

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[165] *See* 52 Fed. Reg. 30730 (1987).

[166] *Id.*

[167] *See* 56 Fed. Reg. 29,995 (1991).

[168] Interview with Elyse DiBiagio-Wood, Office of Enforcement, Water Division, U.S. EPA, in Washington, DC (October 10, 1991).

[169] *See* 54 Fed. Reg. 20,608 (1989).

[170] *See* 54 Fed. Reg. 50,708 (1989)(codified at 33 CFR §326.6 (1991)). The Corps did not achieve the same dispatch with respect to Class II penalty procedures it had demonstrated with respect to the Class I penalty procedures. The Corps' last several Regulatory Agendas have included schedules for developing those procedures, but those schedules have yet to be met. *See, e.g.*, 56 Fed. Reg. 53207 (1991). As of February 1992, the Corps has yet to propose procedures for Class II penalties.

[171] Apparently, however, this rule has never been used. Interview with Lance Wood, Office of Chief Counsel, U.S. Army Corps of Engineers, in Washington, DC (March 13, 1992). It is not clear why the Corps has not used this authority, although it may relate to the fact that the Corps has no history of administrative adjudication, lacking any ALJs, and therefore is institutionally ignorant of administrative adjudication.

[172] *See* 43 Fed. Reg. 54186 (1978), adopting 33 CFR Subpart 1.07.

[173] 33 USC §1321(b)(6)(B)(Supp. III 1990). Also, pursuant to the SARA amendments to CERCLA, *see* note 15 *supra*, the President delegated his authority to assess both Class I and Class II

EPA's proposed rule would create a new Part 28 in title 40 of the Code of Federal Regulations. This Part 28 would contain the consolidated rules of practice for informal penalties imposed under the Clean Water Act, CERCLA, EPCRA, and the Safe Drinking Water Act. At 13 pages of Federal Register, however, this Part would be longer than EPA's consolidated rules of practice for *formal* penalties in Part 22. It is also over four times the length of the penalty procedures used by the Coast Guard or the Corps of Engineers for their informal penalty proceedings.[175] The preamble to the rule extends to 25 Federal Register pages. What is it that makes these "informal" proceedings so complicated?

Under both the Clean Water Act and Safe Drinking Water Act administrative penalty provisions, EPA is required to give "public notice" before assessing a penalty, so that "interested persons" may comment on the proposed penalty and, if the defendant requests a hearing, participate in the hearing.[176] Under the Clean Water Act provision, even if the defendant does not request a hearing, any interested person who comments on the proposed penalty may petition EPA within 30 days of the issuance of the order to set aside the order and to provide a hearing.[177] EPA is required to set aside the order and hold a hearing if evidence contained in the petition is material and was not considered in issuing the order.[178]

In addition, under the Clean Water Act EPA must consult with the State in which the violation occurs in assessing the administrative penalty.[179]

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administrative penalties under 42 USC §9609(b), not only to EPA, but also to the Coast Guard when the violation occurs in waters of the United States. *See* Section 4(c)(2), Exec. Order No. 12580, 52 Fed. Reg. 2923 (1987), *reprinted in* 42 USC 9609 note (1988).

[174] *See* 58 Fed. Reg. 17926 (1993).

[175] *See* 33 CFR Subpart 1.07 (1991); 33 CFR §326 (1991).

[176] *See* 33 USC §1319(g)(4)(A)&(B) (1988); 42 USC §300h-2(c)(3)(B)&(C) (1988). Under the Clean Water Act, if the Corps of Engineers is assessing an administrative penalty for a violation of a Section 404 permit, these same public procedures would apply to the Corps' proceeding. *See* 33 USC §1319(g)(4) (1988). Similar public participation rights exist with respect to Class II penalties only under the Oil Pollution Act provisions. 33 USC §1321(b)(6)(C)(Supp. III 1990).

[177] *See* 33 USC §1319(g)(4)(C) (1988). Again, this is also true of Corps' proceedings under the same section for violations of §404 permits. Again, also, there is a similar provision with respect to Class II penalties only under the Oil Pollution Act. 33 USC §1321(b)(6)(C)(Supp. III 1990).

[178] 33 USC §1319(g)(4)(C) (1988). Again, this is also true of Corps' proceedings under the same section for violations of §404 permits. Again, also, there is a similar provision with respect to Class II penalties only under the Oil Pollution Act. 33 USC §1321(b)(6)(C)(Supp. III 1990).

[179] *See* 33 USC §1319(g)(1)(1988).

These public procedures are unusual for an adjudication. EPA's proposed rule provides that public notice should be given by mail to "any person who requests such notice."[180] In addition, notice should be given to "potentially affected persons" in an unspecified manner.[181] The preamble states that EPA intends "ordinarily" in these circumstances to publish notice in a local newspaper or other media.[182] The public notice is a document that identifies the respondent, the EPA office involved, any permit involved, the alleged violations, the Hearing Clerk whom interested persons may contact for further information, and EPA's authority to issue a default order if respondent does not respond in a timely manner.[183] In addition, the notice includes the information that a member of the public may submit written comments on the complaint to the Hearing Clerk and become a participant in the proceeding.[184] Any comments must be filed within 30 days of receipt of the notice.[185] They then become part of the administrative record, subject to certain limitations.[186]

Participation by commenters in the proceeding itself is strictly limited. Classifying commenters as "participants,"[187] but not "parties,"[188] EPA does not allow commenters to take part in the prehearing conference, engage in any discovery, or have any participation in default or consent orders or summary or accelerated decisions.[189] Commenters are allowed to call witnesses and introduce evidence after the conclusion of both EPA's and the respondent's case,[190] but commenters are not allowed to cross-examine either the agency's or the respondent's witnesses.[191] The parties, however, may cross-examine the commenters' witnesses.[192] Commenters may participate in closing arguments and submit proposed findings of fact and conclusions of law to the Presiding Officer.[193]

In the event that a hearing is not held, EPA's proposed rule reiterates that a commenter may petition the Regional Administrator to set aside the order and to hold a hearing, if the commenter has material information not already considered.[194] If the petition is granted, there is a hearing; if the petition is denied, the participants are notified, and the denial is noticed in the Federal Register.[195]

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[180] Proposed 40 CFR §28.16(d), 56 Fed. Reg. 30027 (1991).

[181] *Id.*

[182] *See* 56 Fed. Reg. 30010 (1991).

[183] *See* Proposed 40 CFR §28.2(q), 56 Fed. Reg. 30023 (1991).

[184] *Id.*

[185] *See* Proposed 40 CFR §28.20(c), 56 Fed. Reg. 30027 (1991).

[186] *See* Proposed 40 CFR §28.2(b)(9), 56 Fed. Reg. 30021 (1991).

[187] *See* Proposed 40 CFR §28.2(l), 56 Fed. Reg. 30022 (1991).

[188] *See* Proposed 40 CFR §28.2(m), 56 Fed. Reg. 30022 (1991).

[189] *See* Proposed 40 CFR §§28.21 - 28.25, 56 Fed. Reg. 30028-30 (1991).

[190] *See* Proposed 40 CFR §28.26(g)(5), 56 Fed. Reg. 30031 (1991).

[191] *See* Proposed 40 CFR §28.26(f), 56 Fed. Reg. 30031 (1991).

[192] *Id.*

[193] *See* Proposed 40 CFR §28.26(i) & (k), 56 Fed. Reg. 30031 (1991).

Despite the rather elaborate public procedures, interested persons rarely, if ever, either comment on a proposed order or participate in a hearing.[196] This may be because there are not very many persons who would be interested in penalty orders, other than perhaps some environmental groups. Environmental groups were, after all, the ones who raised the specter that EPA might use these administrative penalties only to slap offenders on the wrist, and the public procedure requirements were placed in the law presumably so that environmental groups could monitor EPA's activity. This does not appear to be happening.

There are a number of possible explanations. One is that environmental groups may not be getting effective notice. The proposed rule states that public notice will be provided to "any person who requests such notice."[197] Because penalty actions are initiated at the regional level, this means that persons must request such notice from regional offices. It is doubtful, however, whether regional environmental groups are even aware of this opportunity or requirement for notice. EPA's preamble suggests that the agency will maintain "an appropriate mailing list."[198] An FOI request to each of the EPA regions, however, resulted in many offices indicating no list, because no one has requested to be given notice.[199] Some offices provided a general notification list, but an addressee on one of the lists does not recall ever receiving public notice of an administrative penalty action.[200] The preamble also states that notice to potentially affected members of the public is also to be given, "ordinarily" by publishing notices in local newspapers.[201] Assuming such notice is given, it still would not be surprising if environmental groups or others with an interest in penalty actions do not discover it.

Another explanation is that environmental groups simply may not have the time or resources to research the issues in the penalty orders about which they receive notice. Most environmental groups, even well-funded ones, are stretched in terms of the issues and projects they can cover. The administrative penalties assessed under the Clean Water Act and Safe Drinking Water Act, and especially the Class I penalties under the Clean Water Act, are relatively small in amount and the cases relatively straightforward. Consequently, environmental groups may not see commenting on or participating in administrative penalties as an efficient use of their resources.[202]

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[194] *See* Proposed 40 CFR §28.30(a), 56 Fed. Reg. 30033 (1991).

[195] *See* Proposed 40 CFR §28.30(b) & (c), 56 Fed. Reg. 30033 (1991).

[196] In talking to a number of EPA personnel involved in Class I penalty proceedings, I have found only one person who knows of instances when there have been comments filed by interested persons. Apparently, sometimes mining or "right wing public interest groups" comment in Alaska. The Federal Register fails to show any case where a hearing has been required because a commenter has petitioned for one.

[197] Proposed 40 CFR §28.16(d), 56 Fed. Reg. 30027 (1991).

[198] 56 Fed. Reg. 30010 (1991).

[199] *See, e.g.*, letter from Veronica Harrington, Chief, NPDES Program Operations Section, Region I, EPA, Boston, Massachusetts to the author (February 11, 1992)(on file with the author).

[200] Letter from Kirk Cunningham, Water Quality Chair, Sierra Club, Boulder, Colorado, to the author (February 3, 1992)(on file with author).

[201] 56 Fed. Reg. 30010 (1991).

A third explanation may be that EPA's actions under the administrative penalty program are satisfactory to environmental groups, so they see no need to comment or participate in the hearings. Perhaps the most likely explanation is a combination of all three. Only a subset of potentially interested persons are probably receiving effective notice, and the environmental groups who do receive notice probably do not see that the marginal benefit from their commenting or participation in the proceeding is worth the cost to their organizations.

Consultation with the state is achieved by notice of the action to the agency with the most direct authority related to the matters in the action.[203] EPA must give this notice within 30 days of the respondent's receipt of the complaint.[204] No further specification is given as to the nature or method of the state consultation.[205] The preamble states that the nature or substance of the consultation need not be part of the administrative record.[206]

There is little evidence that this consultation with the state is meaningful. Generally, EPA's enforcement is coordinated so as not to interfere with state enforcement, so there develops a division of labor. EPA generally monitors the states' enforcement activities and the states generally monitor EPA's, but normally there is little overlap. Consequently, it seems unlikely that states are using their limited resources to become actively involved in administrative penalty cases, which are of the smallest consequence and are the least problematic of enforcement cases.

The public procedures, however, are not the source of the complexity of EPA's proposed rules. After all, the Corps of Engineers is under identical statutory requirements for its enforcement of Section 404 of the Clean Water Act, and the Coast Guard is under identical requirements with respect to its Class II administrative penalties.[207] Rather the complexity arises out of two potentially conflicting purposes of EPA's rules. One purpose is to ensure sufficient procedures to satisfy due process; the other is to ensure the most timely conclusion of informal penalty cases and to constrain substantially the discretion of the hearing officer both with respect to the procedure and the substance of the penalty proceeding, presumably also to ensure expedition. The procedures of the Corps and the Coast Guard share the former purpose, but not the latter.

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[202] *See* Letter from Kirk Cunningham, Water Quality Chair, Sierra Club, Boulder, Colorado to the author (February 3, 1992)(on file with author).

[203] Proposed 40 CFR §28.19, 56 Fed. Reg. 30027 (1991).

[204] *Id.*

[205] The Corps of Engineers' rule specifies that the appropriate state agency shall have the same opportunity to comment and participate in the hearing as a public commenter. *See* 33 CFR §26.6(d)(3) (1991).

[206] 56 Fed. Reg. 30011 (1991). The actual regulatory language, however, is ambiguous on this issue. *See* Proposed 40 CFR §28.1(b)(4), 56 Fed. Reg. 30021 (1991).

Both the Corps and EPA procedures establish a Presiding Officer,[208] while the Coast Guard provides for a Hearing Officer.[209] Under EPA's procedures the Regional Administrator appoints a Presiding Officer for a case within 20 days of service of the complaint.[210] The Presiding Officer is to be "an Agency attorney"[211] who has no interest in the outcome of the case or any prior connection with the case before him, whether investigative, prosecutorial, or supervisory.[212] Under the Corps procedures, the District Engineer appoints as Presiding Officer a member of "Corps counsel staff or other qualified person," who likewise is to have had no prior connection with the case[213] and is to have no investigative, prosecutorial, or supervisory responsibility with respect to the case before him.[214] Both sets of procedures prohibit *ex parte* communications with the Presiding Officer[215] and provide for removal of the Presiding Officer for making prohibited *ex parte* communications.[216] Both allow for sanctions against a participant for making *ex parte* communications.[217] Unlike EPA and the Corps' Presiding Officer, the Coast Guard's Hearing Officer need not be an attorney.[218] The neutrality requirements are stricter, however, prohibiting the Hearing Officer not only from having any prior connection or responsibility with respect to the particular case but also from having any "other responsibility, direct or supervisory, for the investigation of cases referred for the assessment of civil penalties."[219] In other words, unlike the EPA and Corps' Presiding Officer, the Coast Guard's Hearing Officer cannot otherwise be involved in enforcement activities. There are, however, no prohibitions on *ex parte* communications with respect to the Hearing Officer.

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[207] *See* 33 USC §1321(b)(6)(C)(Supp. III 1990).

[208] Proposed 40 CFR §28.2(n), 28.4, 56 Fed. Reg. 30023 (1991); 33 CFR §§326.6(a)(3)(v), 326.6(h)(3)(1991).

[209] *See* 33 CFR §§1.07-5(b), 1.07-15 (1991).

[210] *See* Proposed 40 CFR §28.16(h), 56 Fed. Reg. 30027 (1991).

[211] Proposed 40 CFR §28.2(n), 56 Fed. Reg. 30022 (1991).

[212] *See* Proposed 40 CFR §28.4(c)(1) & (2), 56 Fed. Reg. 30024 (1991).

[213] 33 CFR §326.6(h)(4) (1991).

[214] 33 CFR §326.6(h)(3) (1991).

[215] *See* Proposed 40 CFR §28.2(p), 56 Fed. Reg. 30023 (1991); 33 CFR §326.6(a)(3)(vi) (1991).

[216] *See* Proposed 40 CFR §28.13(a), 56 Fed. Reg. 30025 (1991); 33 CFR §326.6(h)(5)(iii) (1991).

[217] *See* Proposed 40 CFR §28.12, 56 Fed. Reg. 30025 (1991); 33 CFR §326.6(h)(5)(iv) (1991).

[218] *See* 33 CFR §1.07-5(b) (1991).

[219] 33 CFR §1.07-15(a) (1991).

The general role of the Presiding Officer and Hearing Officer is similar under the three sets of procedures. The Presiding Officer or Hearing Officer is responsible for conducting any hearing.[220] The Presiding Officers make a recommended decision,[221] while the Hearing Officer makes a decision that may be appealed.[222] The Coast Guard and the Corps' regulations, however, address the hearing procedures rather generally, providing a fair degree of discretion to the Presiding Officer in terms of controlling the hearing.[223] EPA's proposed regulations read like a detailed cookbook.

First, there are specified procedures separately governing consent orders, summary determinations, and accelerated recommended decisions.[224] There are no comparable Coast Guard or Corps provisions. The proposed EPA regulations authorize consent orders between the parties at any time, which immediately have binding legal force without further action by the Presiding Officer or the Regional Administrator.[225] If, however, the case arises under the Clean Water Act or Safe Drinking Water Act and members of the public have commented, the parties must propose the consent order to the Regional Administrator, who must approve or disapprove it.[226] Elaborate procedures are provided for summary determinations as to liability, which may be made by the Presiding Officer *sua sponte* or at the request of any party.[227] If the Presiding Officer determines there is no genuine issue of material fact with respect to liability, he may "accelerate" a recommended decision, unless "there is compelling need for further fact-finding" with respect to the amount of penalty.[228]

Second, EPA's procedures go into substantial detail as to default proceedings,[229] while the Coast Guard and Corps' provisions merely state that failure to request a hearing within 30 days waives the right to a hearing.[230] The EPA provisions distinguish here, as they do elsewhere, between determinations of liability and determinations of remedy (penalty amount).[231] Failure to respond within the required 30 days results in a default as to liability, so long as the

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[220] Proposed 40 CFR §28.4(a)(2), 56 Fed. Reg. 30023 (1991); 33 CFR §1.07-55 (1991); 33 CFR §326.6(i)(1991).

[221] Proposed 40 CFR §28.4(a)(1)(xii), 56 Fed. Reg. 30023 (1991); 33 CFR §326.6(j)(1991).

[222] 33 CFR §1.07-65 (1991).

[223] *See generally* 33 CFR §§1.07-55, 326.6(i) (1991).

[224] *See* Proposed 40 CFR §§28.22 & 28.25, 56 Fed. Reg. 30028-30031 (1991).

[225] *See* Proposed 40 CFR §28.22(a), 56 Fed. Reg. 30028 (1991).

[226] *See* Proposed 40 CFR §28.22(b), 56 Fed. Reg. 30028 (1991).

[227] *See* Proposed 40 CFR §28.25, 56 Fed. Reg. 30030 (1991).

[228] *Id.*

[229] *See* Proposed 40 CFR §28.21, 56 Fed. Reg. 30028 (1991).

[230] 33 CFR §§1.07-25(b), 326.6(g)(2) (1991).

[231] *See* Proposed 40 CFR §28.21, 56 Fed. Reg. 30028 (1991).

Presiding Officer finds that the complaint states a cause of action.[232] The allegations in the complaint become the Presiding Officer's recommended findings of fact and conclusions of law.[233] Where there has been default as to liability, EPA must submit "written argument (with any supporting documentation) regarding the assessment of an appropriate civil penalty" to the Presiding Officer.[234] Each of the separate statutes authorizing EPA's administrative penalties contains "factors" to be considered in setting the penalty amount.[235] This requirement to justify the penalty amount even in default cases is directly responsive to *Katzson Bros., Inc. v. EPA*,[236] which remanded a penalty assessment order because there was no evidence of consideration of the statutory factors, even though the defendant had never requested a hearing and a default judgment had been entered against him.

Third, the EPA procedures contain provisions on a prehearing conference and discovery.[237] There are no comparable Corps provisions, and the Coast Guard merely provides that generally the defendant may receive a free copy of all written evidence in the case file.[238] EPA's prehearing conference, which may be conducted by telephone,[239] must be held not later than 30 days after the defendant's response to the complaint.[240] Its purpose is to schedule and limit discovery, to simplify issues, and establish the time and place for the proceeding on the merits.[241] The proposed regulations specify that the Presiding Officer issue a prehearing order memorializing rulings in the conference within 20 days of the conference[242] and that the hearing on the merits occur not sooner than 30 days following the conference and not sooner than seven days after completion of discovery.[243]

Discovery is denominated "information exchange" and is limited by the proposed regulation to the name of each witness, a brief description of the witness' connection to the case, the witness' qualifications (if the person is to be an expert witness), the subject matter of the intended testimony, and a copy of any documents intended to be introduced.[244] In addition, EPA is allowed to require the defendant to produce any information relating to the defendant's net profits, delayed or avoided costs or other benefit derived from the alleged violation, as well as any information relevant to defendant's inability to pay a penalty.[245] The defendant, however, is precluded from discovering the basis for a proposed penalty amount,[246] and the proposed regulation prohibits the Presiding Officer from requiring any discovery not mandated in the regulation.[247]

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[232] *Id.*

[233] *Id.*

[234] Proposed 40 CFR §28.21(b), 56 Fed. Reg. 30028 (1991).

[235] *See* Proposed 40 CFR §28.21(b), 56 Fed. Reg. 30028 (1991).

[236] 839 F.2d 1396 (10th Cir. 1988).

[237] *See* Proposed 40 CFR §§28.23 & 28.24, 56 Fed. Reg. 30029 (1991).

[238] 33 CFR §1.07-30 (1991).

[239] *See* Proposed 40 CFR §28.23(a), 56 Fed. Reg. 30029 (1991).

[240] *Id.*

[241] *See* Proposed 40 CFR §28.23(b), 56 Fed. Reg. 30029 (1991).

[242] *See* Proposed 40 CFR §28.23(d), 56 Fed. Reg. 30029 (1991).

[243] *See* Proposed 40 CFR §28.23(c), 56 Fed. Reg. 30029 (1991).

[244] *See* Proposed 40 CFR § 28.24(b)(1), 56 Fed. Reg. 30029 (1991).

Fourth, the EPA proposed regulations bifurcate the administrative proceeding into two components: a liability determination and a penalty determination. For example, while the proposed regulations presume the right of participants to introduce testimony as to liability, only if there is "a compelling need for additional fact-finding on issues material to remedy" is the Presiding Officer granted discretion to allow testimony as to penalty.[248] This arises from EPA's view that, whereas decisions as to liability involve questions of fact as to which EPA has the burden of proof,[249] "penalty issues are matters of persuasion rather than proof."[250] Thus, EPA envisions hearings as to liability, but only argument with respect to penalty amount. Moreover, whereas EPA has the burden of going forward with respect to establishing liability, the defendant has the burden of going forward to show that the penalty requested should not be granted.[251] This differs from EPA practice in formal, APA adjudications.[252]

The proposed regulation is not entirely clear, but EPA appears to suggest that it may include the statutory maximum penalty in its complaint without any underlying support.[253] If the defendant does not meet its burden of going forward to reduce that amount, EPA need not submit any evidence on the penalty amount.[254] Only in the course of its "argument" as to application of the appropriate penalty factors, after liability has been established, might EPA even indicate the actual penalty amount requested. Presumably, this strategy provides an additional incentive for defendants to settle.

Fifth, to ensure expedition, the proposed regulation sets strict page limits on written arguments[255] and strict time limits for every stage of the proceeding.[256]

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[245] *Id.*

[246] *See* 56 Fed. Reg. 30006 (1991).

[247] *See* 56 Fed. Reg. 30015 (1991).

[248] Proposed 40 CFR §28.26(h), 56 Fed. Reg. 30031 (1991).

[249] *See* 56 Fed. Reg. 30006 (1991).

[250] *Id.*

[251] *See* Proposed 40 CFR §28.10(b), 56 Fed. Reg. 30025 (1991). *See also* 56 Fed. Reg. 30006 (1991).

[252] *See* 56 Fed. Reg. 30009 (1991).

[253] *See* 56 Fed. Reg. 29999, 30008-30009 (1991).

[254] *See* 56 Fed. Reg. 30006 (1991). The preamble states, however, that "in the absence of any support" in the record, the Regional Administrator "should" impose only a "token or symbolic amount." *Id.*

[255] *See* Proposed 40 CFR §28.8, 56 Fed. Reg. 30024 (1991).

[256] *See* Proposed 40 CFR §§28.20, 28.23, 28.24(c), 56 Fed. Reg. 30027, 30029 (1991).

Finally, unlike the Coast Guard and Corps' regulations, the EPA proposed regulation places the Presiding Officer under severe restraints, rather than relying upon his discretion. This is most apparent in Proposed Section 28.4, which purports to list all the authorities and duties of the Presiding Officer, and which contains various limitations on the Presiding Officer.[257] Failure to fulfill these duties or a violation of these limitations may result in removal of the Presiding Officer.[258] Although the limitations to ensure the Presiding Officer's neutrality are unexceptional, other limitations on the Presiding Officer are noteworthy. First, EPA enforces the limitation on discovery by allowing for removal of the Presiding Officer if he grants any delay, continuance, or stay to a participant because the participant is awaiting information sought under the Freedom of Information Act (FOIA).[259] While EPA cannot restrict a defendant's (or commenter's) ability to make FOIA requests for whatever reason, including discovery, EPA can effectively limit the usefulness of the FOIA by setting time schedules, such that the requester would be unlikely to receive a response in time. Were the defendant able to obtain a stay or delay, however, perhaps FOIA requests could be successful. This limitation ensures that FOIA will not be a useful tool. Second, the Presiding Officer may be removed if he allows the introduction of any evidence relating to the settlement of any action.[260] This reflects an underlying concern of EPA's not to allow its policies or practices regarding settlements of violations to affect its prosecution of violations.[261] Presumably, EPA fears that defendants will argue that under similar circumstances others have settled for far less, hoping that the Presiding Officer will set a like penalty amount. It is important to EPA to maintain substantial differentials between penalties imposed by settlement and those imposed by order so as to create a significant incentive to settle. Third, the Presiding Officer may be removed if he hears or considers any challenge to a final State or EPA action, including a permit issuance.[262] Clearly, EPA does not want the administrative proceeding to become a forum for a challenge to the lawfulness of the underlying legal requirements alleged to have been violated. Fourth, the Presiding Officer may be removed for dismissing the administrative complaint.[263] Under EPA's scheme, if the Presiding Officer believes an administrative complaint is defective, he has no authority to dismiss it. Rather he is limited to recommending its withdrawal to the Regional Administrator.[264] None of these substantive policies is particularly objectionable, but as even EPA notes, to make their violation grounds for removal of a Presiding Officer "goes beyond the usual."[265]

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[257] 56 Fed. Reg. 30023-30024 (1991).

[258] *See* Proposed 40 CFR §28.13(a), 56 Fed. Reg. 30025 (1991).

[259] *See* Proposed 40 CFR §28.4(c)(4), 56 Fed. Reg. 30024 (1991). *See also* 56 Fed. Reg. 30004 (1991).

[260] Proposed 40 CFR §28.4(c)(5), 56 Fed. Reg. 30024 (1991).

[261] *See, e.g.*, 56 Fed. Reg. 30001 (1991) (discussing content of administrative record).

[262] *See* Proposed 40 CFR §28.4(c)(6), 56 Fed. Reg. 30024 (1991).

[263] Proposed 40 CFR §28.4(c)(7), 56 Fed. Reg. 30024 (1991).

After the proceeding before the Presiding Officer, both the Corps and EPA procedures require the Presiding Officer to send a recommended decision to the District Engineer and Regional Administrator, respectively.[266] Unlike the procedure under the APA,[267] the parties have no opportunity to comment on the recommended decision before the superior makes the final decision. Under the Coast Guard procedures, the Hearing Officer actually makes the final decision.[268] Neither the Corps nor EPA provide for an administrative appeal of a final penalty assessment. EPA goes one step further, specifically prohibiting any request for reconsideration or administrative appeal.[269] Moreover, any attempt to appeal is defined as a "prohibited communication" that can lead to sanctions against the "appellant."[270] The Coast Guard, on the other hand, provides for an administrative appeal to the Commandant of the Coast Guard.[271]

Emphasis on settlement is explicit in the EPA proposed rules.[272] The strict, 30-day deadline for an answer to the complaint is automatically extended 30 days if the defendant files notice of a settlement offer,[273] and with EPA's agreement can be extended 90 days.[274] Settlement can be reached and confirmed in a consent order at any time before final EPA action.[275] The proposed regulations allow the Presiding Officer no role in the settlement negotiations or the issuance of any consent order.[276] Except in Clean Water Act and Safe Drinking Water Act cases in which commenters have participated, the regional enforcement office and the defendant may negotiate a final consent order without the need to obtain approval of either the Presiding Officer or the Regional Administrator.[277] Where members of the public have become participants in Clean Water Act or Safe Drinking Water Act cases, the consent order must be approved by the Regional Administrator, who may require the settling parties to explain in writing the legality of the consent order.[278]

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[264] *See* Proposed 40 CFR §28.2(r), 56 Fed. Reg. 30023 (1991). Under the Coast Guard procedures, the Hearing Officer may dismiss a case without prejudice once, but thereafter the Hearing Officer may dismiss the complaint with prejudice. 33 CFR § 1.07-65(a) (1991).

[265] *See* 56 Fed. Reg. 30007 (1991) (discussing request for alternate Presiding Officer).

[266] Proposed 40 CFR §28.27, 56 Fed. Reg. 30032 (1991); 33 CFR §326.6(j)(1991).

[267] *See* 5 USC §557(c) (1988).

[268] 33 CFR §1.07-65 (1991).

[269] *See* Proposed 40 CFR §28.14, 56 Fed. Reg. 30026 (1991).

[270] *See* Proposed 40 CFR §28.2(p), 56 Fed. Reg. 30023 (1991).

[271] 33 CFR §1.07-70-75 (1991).

[272] *See* 56 Fed. Reg. 30012 (1991)("EPA favors the resolution of disputes in the most timely and effective manner possible, and is particularly concerned that it not burden small or unsophisticated respondents with unnecessary proceedings.... Consequently, these proposed rules favor the settlements of disputes.").

[273] *See* Proposed 40 CFR §28.20(b)(2), 56 Fed. Reg. 30027 (1991).

[274] *See* Proposed 40 CFR §28.20(b)(1), 56 Fed. Reg. 30027 (1991).

[275] *See* Proposed 40 CFR §28.22(a), 56 Fed. Reg. 30028 (1991).

[276] *See* 56 Fed. Reg. 30013-14 (1991).

[277] *See id.*

IV. The Experience at EPA[279]

The position of "Presiding Officer" at EPA is not limited to the function of adjudicating informal penalty proceedings.[280] EPA assigns other informal adjudications to Presiding Officers[281] and, depending upon the region, other nonformal public hearings.[282] In addition, under the Clean Air Act and Clean Water Act, if persons are convicted of criminal violations, they are barred from performing any government contract at the facility involved until EPA determines that the condition has been corrected.[283] Under EPA's regulations, the hearings governing those lists are conducted by "case examiners,"[284] who are Presiding

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[278] *See* Proposed 40 CFR §28.22(b), 56 Fed. Reg. 30028 (1991).

[279] As indicated in Part I of this article, the Coast Guard's experience with informal penalty procedures predates EPA's. Moreover, in the volume of cases the Coast Guard dwarfs EPA, processing some 20,000 informal penalty cases a year. *See* Frye, *Survey of Non-ALJ Hearing Programs in the Federal Government*, ADMIN. L. R. 261, 283 (1992). These cases arise under a number of statutes. *See, e.g.*, 33 USC §§ 495(b), 499(c), 502(c), 1232(a), 1236, 1321(b)(6), 1608, 2072, 2107 (1988 & Supp. III 1990); 46 USC §2107 (1988); 49 USCApp. §1809 (Supp. III 1990). Many of the penalties under these provisions amount to the equivalent of traffic tickets for pleasure boats. *See, e.g.*, Green v. United States, 642 F.Supp. 638 (N.D. Ill. 1986). Only 33 USC §1321(b)(6)(B)(i)(Supp. III 1990), however, expressly authorizes a non-APA proceeding. While the Coast Guard says that it uses its informal procedures under 33 CFR 1.07 for all its civil penalty enforcement, *see* 33 CFR §1.07-1 (1991), this obviously cannot be true for those civil penalties expressly required to be conducted pursuant to the APA. *See, e.g.*, 33 USC §1321(b)(6)(B)(Supp. III 1990). Moreover, as indicated in Part I, while the Coast Guard has been generally successful in its attempts to deny *de novo* review of its informal administrative penalty determinations, the case law is sufficiently confused not to rule out the possibility of a successful challenge. Despite this caseload, the Coast Guard has only 10 Hearing Officers, who are headquartered in the various Coast Guard districts. *See* Frye, *Survey of Non-ALJ Hearing Programs in the Federal Government*, *supra* this note, at 283. This is explained by the fact that only five-to-seven percent of the cases involve hearings. *Id.*

Because of the peculiarities of the Coast Guard's penalty regime and the inability readily to compare it to a formal adjudication regime, the focus of this article is on EPA's implementation.

[280] To confuse the issue, EPA regulations use the term "presiding officer" to refer not only to non-ALJ presiding officers but also to those ALJs designated to be "presiding officers" in particular, formal adjudications. *See, e.g.*, 40 CFR § 27.11 (1991). In this article, the term "presiding officer" will be used to refer only to non-ALJ hearing officers.

[281] *See, e.g.*, 40 CFR §§24.09, 24.13, 222.6 (1991). *See also* 40 CFR §124.119 (1991)(ALJ normally responsible for hearing, but upon agreement of parties a non-ALJ presiding officer may be assigned).

[282] *See generally* Regional Presiding Officer/Regional Judicial Officer Accomplishments Report, Environmental Protection Agency (November 1992) (hereinafter *Accomplishments Report*), at 1, 4-7.

[283] *See* 33 U.S.C §1368 (1988); 42 USC §7606 (Supp. III 1990).

[284] *See* 40 CFR §15.4 (1991).

Officers.[285] Moreover, there is a related position of "Regional Judicial Officer" to which the Regional Administrator may delegate her authority to act in formal APA penalty proceedings.[286] As a matter of practice, several Regional Judicial Officers have been authorized to issue final orders on consent and on default and to handle pre-answer motions in these formal proceedings.[287] Unlike a "Presiding Officer," a Regional Judicial Officer cannot be employed by the Region's enforcement office or by the office associated with the violation at issue.[288]

Most regions have appointed one attorney to be both the standing Presiding Officer and Regional Judicial Officer.[289] While EPA's workload model indicates that this standing position constitutes only three-tenths of a work year, several regions have found it to require more resources than the model indicates.[290] The persons appointed to these positions in January 1990 formed a workgroup to share information and experiences.[291]

Most, if not all, of the Regional Presiding Officers are experienced enforcement attorneys with substantial background enforcing the types of cases that they would be called upon to adjudicate. There is some question how the assignment as a Presiding Officer affects one's career path. Apparently, it is not seen as a step up, but as more a lateral, part-time assignment. Among younger, ambitious attorneys, such a position might be viewed as actually interfering with their plans for advancement. Because the Presiding Officers who have been assigned are for the most part senior attorneys who probably have already reached the peak of their career ladder before their assignment, this issue does not seem to have raised problems.

A related issue is the system for evaluating Presiding Officers. In those regions where the Judicial Officer and Presiding Officer are not the same standing position, the person acting as Presiding Officer is likely to come from the office of Regional Counsel and may continue to be evaluated by the Regional Counsel, as head of enforcement within the region. This is understandable in light of the fact that the person probably only acts as Presiding Officer on a part-time basis and as an enforcement attorney for the remainder of his time. Most regions have not adopted this model, however. In Region IX, for example, the Regional Administrator is the person who rates the Presiding Officer, and the Presiding Officer does not have an active role in enforcement.[292]

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[285] *See Accomplishments Report, supra* note 282, at 6.

[286] *See* 40 CFR §22.04(3) (1991).

[287] *See Accomplishments Report, supra* note 282, at 5.

[288] *See* 40 CFR §22.04(2) (1991).

[289] *See Accomplishments Report, supra* note 282, at 2.

[290] *See id.*, at 7-8.

[291] *See id.*, at 2.

[292] Phone interview with Steven Anderson, Region IX Presiding Officer, July 1991.

At EPA the total volume of administrative actions, including formal and informal, penalty and compliance actions, is on the order of 4000 per year.[293] Of these about 1400 are administrative penalty cases.[294] Unfortunately, EPA does not break this figure down into informal and formal proceedings. The Office of Wastewater Enforcement and Compliance, however, does maintain some statistics distinguishing between its formal and informal penalty proceedings. Of the total of 242 proposed administrative penalty orders for violations of NPDES permits or pretreatment standards in FY 1991, 191 were proposed Class I (informal) penalties and 91 were Class II (formal) penalties.[295] While these figures do not include all the informal administrative penalty cases,[296] of the other programs utilizing informal administrative penalties only the Safe Drinking Water Underground Injection Control (UIC) program involves numbers of cases comparable to the NPDES and pretreatment program enforcement.[297] This suggests that the overwhelming proportion of the 1400 administrative penalty cases in FY 1990 were pursuant to formal proceedings.

The Clean Water Act Class I penalty cases are not spread evenly among EPA's 10 regions. Thus, in FY 1990 Regions 4 and 6 each accounted for more than one-third of all the proposed Class I administrative penalty orders issued, while none of the remaining regions had as many as ten, and two regions had none at all.[298] These differences reflect both different regional enforcement strategies and differences in state environmental enforcement.[299]

The number of informal penalty cases brought (or disposed of) by EPA, however, may not accurately reflect the load placed on Presiding Officers. On the one hand, they may understate the load. Regional Presiding Officers/Judicial

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[293] *See* Enforcement Accomplishments Report, FY 1990, United States Environmental Protection Agency (February 1991), at 3-3.

[294] *See* National Penalty Report, Overview of EPA Federal Penalty Practices, FY 1990, Office of Enforcement, Compliance Policy and Planning Branch (April 1991), at 7.

[295] *See* FY 1991 Administrative Enforcement Report, Office of Wastewater Enforcement and Compliance, Enforcement Division, Policy Development Branch, U.S.E.P.A. (April 1992)(hereinafter *FY 1991 Administrative Enforcement Report*) at 4.

[296] Specifically, they do not include Safe Drinking Water Underground Injection Control (UIC) cases, CERCLA cases, Section 404 cases, or Oil Pollution Act cases.

[297] In Region II, there were 15 informal penalty proceedings in UIC cases compared with seven informal penalty proceedings in Clean Water Act cases. *See* Attachment to letter from Charles E. Hoffman, Assistant Branch Chief, Water, Grants and General Law Branch, Region II, U.S.E.P.A., to William Funk, dated September 26, 1991 (hereinafter *Hoffman letter*)(on file with author).

[298] Memorandum from Richard G. Kozlowski, Director, Enforcement Division, to Regional Water Management Division Directors, Use of Administrative Penalty Orders (APOs) in FY 1990 (hereinafter *1991 Kozlowski Memorandum*), March 14, 1991, at Appendix (FY 1990 Proposed APOs By Region).

[299] For example, the fact that Region 10 brought no cases in Washington but brought 11 in Alaska reflects Washington's aggressive environmental enforcement and Alaska's nonenforcement of the Clean Water Act.

Officers may be assigned duties not related to informal penalty proceedings.[300] For example, in Region X the Presiding Officer in FY 1990 was assigned to conduct over 40 "public hearings," nonadjudicatory hearings such as NEPA hearings or public participation hearings under various environmental statutes.[301] In Region IX, the Regional Judicial Officer was assigned to hear prehearing motions in over 130 cases in both FY 1991 and FY 1992.[302]

On the other hand, the number of penalty cases may imply a greater load than exists. Class I penalty cases can be disposed of without involving a Presiding Officer. Under the guidance in effect at the time,[303] a Presiding Officer was only assigned to a case when a defendant requested a hearing. Thus, if a defendant simply did not respond to a complaint or settled with EPA without requesting a hearing, no Presiding Officer would have been assigned, but a proposed and final administrative penalty order would have been issued. This may explain why, for example, despite Region VI's 44 proposed Class I penalty orders in FY 1990, only about five cases were assigned to the Regional Presiding Officer.[304] As a matter of statistics, this discrepancy should disappear under EPA's proposed regulations, because the Regional Administrator is to designate a Presiding Officer not later than 20 days after service of the complaint.[305] Nonetheless, the evidence suggests that the vast majority of informal penalty cases never involve a Presiding Officer in a meaningful way. This is consistent with the fact that all but a very few informal penalty cases are settled.[306]

Further evidence of the limited role of Presiding Officers is the corpus of written decisions they have rendered. In FY 1990, Regional Presiding Officers/Judicial Officers issued written decisions in 16 cases, only five of which were informal penalty cases.[307] In FY 1991, there were written decisions in 14 new cases, only six of which were informal penalty cases.[308] In FY 1992, there were written decisions in 19 new cases, only seven of which were informal penalty cases.[309]

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[300] *See supra* notes 280-288.

[301] *See Accomplishments Report, supra* note 282, Table 6.

[302] *See id.* at Table 5.

[303] *See* 52 Fed. Reg. 30730 (1987).

[304] *See Accomplishments Report, supra* note 282, Table 4.

[305] *See* Proposed 40 CFR §28.16(h), 56 Fed. Reg. 30027 (1991).

[306] *See* letter from Robert A. DiBiccaro, Regional Presiding Officer/Judicial Officer, Region I, U.S.E.P.A., to William Funk, dated September 26, 1991 (showing that of the 27 informal civil penalty cases begun and concluded in Region I between October 1, 1988, and July 15, 1991, all were settled); *Hoffman letter, supra* note 297 (stating that of the 18 Class I Clean Water Act cases brought and concluded between February 1989 and February 1991, none required hearings, with 17 settling, and that with respect to the nine outstanding cases, only one will require a written decision).

[307] *See Accomplishments Report, supra* note 282, Appendix, Cumulative List of Decisions.

[308] *See id.*

[309] *See id.*

Settlement, rather than litigation, is also the norm for Class II penalties and other administrative penalties for which formal adjudication would be required.[310] As a result, figures comparing the average time to conclude Class I and Class II penalty orders[311] are not measurements of the time saved by the informal proceeding as compared to a formal, APA adjudication. Nevertheless, the average time for resolution of Class I penalties is less than that for Class II penalties.[312]

	Average Days for Class I Penalties	Average Days for Class II Penalties
FY 1988	129	152
FY 1989	136	210
FY 1990	169	247
FY 1991	167	242

Those involved in the process perceive the reason for the greater period of time for resolving Class II penalties as the fact that Class II penalties are for larger dollar amounts than Class I penalties, and therefore demand and justify greater attention.[313]

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[310] I have found no statistics to support this statement, but everyone I talk to involved in EPA enforcement says this is the case.

[311] This is the average time from the issuance of the proposed order, which is the equivalent of a complaint, and a final order.

[312] *See 1991 Kozlowski Memorandum, supra* note 298, at 9; Memorandum from Richard G. Kozlowski, Director, Enforcement Division, Office of Water, U.S.E.P.A., to Compliance Branch Chiefs and Regional Counsels, re: Use of Administrative Penalty Orders (APOs) in FY 1989, dated March 13, 1990 (hereinafter *1990 Kozlowski Memorandum*), at 6; *FY 1991 Administrative Enforcement Report, supra* note 295, at 9-10. The rapidly increasing length of time for both Class I and Class II penalty proceedings from 1989 and 1990 probably is the result of the rapidly increasing number of proposed orders being issued in 1988 and 1989 without a concomitant increase in personnel and resources. The 1991 reduction in time would be explained by the decrease in proposed orders in 1990.

[313] *See Hoffman letter, supra* note 297, at 2; Interview with Elyse DiBiagio-Wood, Office of Enforcement, U.S. E.P.A., Washington, DC (October 9, 1991); Phone interview with Theodore Rogowski, Office of Regional Counsel, Region X, U.S. E.P.A. (July 2, 1991).

Within the categories of Class I and Class II penalties, the faster cases were not necessarily the smaller cases. Indeed, generally, the faster cases were those that settled for greater than average penalties. *See 1991 Kozlowski Memorandum, supra* note 298, at 9; *1990 Kozlowski Memorandum, supra* note 312, at 7; *FY 1991 Administrative Enforcement Report, supra* note 295, at 10.

	Average Penalty in Slower than Average Class I Penalty Cases	**Average Penalty in Faster than Average Class I Penalty Cases**	**Average Penalty in Slower than Average Class II Penalty Cases**	**Average Penalty in Faster than Average Class II Penalty Cases**
FY 1989	$7,651	$8,715	$30,200	$49,631
FY 1990	$8,641	$7,512	$43,663	$52,462
FY 1991	N/A	N/A	$46,697	$55,946

It is possible that within each class of penalty, the higher penalties reflect cases where the violations are most clearcut and the mitigating factors relatively insubstantial, so that there simply is not as much to negotiate about. Similarly, the lower penalties might reflect cases where the violations are less clear or the mitigating factors are more substantial, so that more time is required to negotiate a proper resolution.

V. The Issues

A. Due Process

A fundamental question is whether the "informal" administrative procedures adopted by EPA, the Corps of Engineers, and the Coast Guard satisfy the requirements of procedural due process for the assessment of monetary penalties. The paucity of case law on the subject means that the answer cannot be certain, but at the same time the lack of serious constitutional challenge suggests that litigants have not thought it to be worth the effort.

Earlier, this article addressed the *Mathews v. Eldridge* three-factor test for determining the required due process procedures. There, the conclusion was that, given the variety of different types of administrative penalties, it was not possible to state a meaningful general requirement. It may be possible, however, to find more guidance with respect to a particular set of administrative procedures. Accordingly, I will focus on EPA's proposed Part 28 rules in terms of due process requirements.

As indicated before, *Mathews v. Eldridge* establishes a three-factor test to assess the adequacy of any given set of procedures. The first factor is the private interest involved. The private interest involved in EPA's penalty provisions is primarily the cost of the penalty. Even within the relatively limited universe of EPA's informal administrative penalty provisions, there is substantial variation in the potential cost. Thus, under the UIC Safe Drinking Water provisions EPA may impose a maximum administrative penalty of $125,000 without subjecting the hearing to the requirements of the APA;[314] while under the Clean Water Act the maximum amount of a Class I penalty is $25,000.[315] Nevertheless, these penalties are substantial in everyday terms and thus should elevate the private interest in sufficient procedures to a high level. Moreover, beyond the mere monetary cost of the penalty, for most persons there is a cost to reputation in being determined a law-breaker, even if in the relatively arcane world of environmental regulation. Indeed, for many companies, to be deemed a violater of environmental standards may seriously impact its relations with its neighbors and its status with customers. Finally, the private interest affected is affected forever. Unlike many of the cases raising due process issues,[316] the informal procedure contained in EPA's proposed Part 28 is not to make a temporary determination pending a final and formal adjudication of the issues. Rather it is the final determination.

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[314] *See* 42 USC §300h-2(c)(1988).

[315] *See* 33 USC §1319(g)(2)(A)(1988).

[316] *See, e.g.*, Brock v. Roadway Express, Inc., 481 U.S. 252 (1987)(procedures used to order temporary reinstatement of discharged employees pending final determination); Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985)(procedures used to terminate employee for cause pending final determination); Mathews v. Eldridge, 424 U.S. 319 (1976)(procedures used to terminate disability benefits pending final determination).

The second *Mathews* factor is the risk of an erroneous determination as a result of informal procedures and the likely improvement that would result from more formal procedures. This factor is undoubtedly the most important, because unless there is harm caused by the informal procedures, which can be relieved or mitigated by more formal procedures, there is little reason to make the procedures more formal, no matter what the relative weight of the private and government interests.[317] To apply this factor one must focus on two issues: the nature of the determinations the adjudication is to make and, in light of the nature of those determinations, what additional procedures might reduce error.

The nature of the determinations to be made is important, because the appropriateness or desirability of a particular procedural enhancement may turn on the nature of the factual determination to be made.[318] In *Mathews*, for example, the Court found direct and cross-examination to be unnecessary to determine the accuracy of the medical assessments of a person's impairment, because adjudicatory procedures used to determine the credibility and veracity of a witness were largely irrelevant to evaluate medical determinations.[319] In many EPA cases, the factual issues as to the presence of a violation are likely to involve written reports concerning pollution discharges and laboratory testing or onsite monitoring of the discharge.[320] A review of the handful of informal penalty determinations that have actually been litigated before a Presiding Officer indicates that factual issues do not predominate and those that exist do not seem to demand trial-type techniques to resolve them.[321]

As EPA's proposed Part 28 procedures recognize, a determination of a violation is only half the proceeding. There remains the issue of the amount of the penalty to be assessed. Under each of the penalty provisions, EPA is required to consider various factors in setting the penalty amount.[322] Several of these are heavily based upon facts that may be disputed. This is particularly true of questions regarding the degree of culpability and the extent of economic benefit or savings attributable to the violation.[323] Nevertheless, most of these questions too seem not to call for trial-type techniques as the most effective means of determining truth.

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[317] This statement reflects a strictly utilitarian, risk/benefit view of the *Mathews* test. While this is undoubtedly the thrust of *Mathews*, there are those who believe that the calculus perhaps should reflect other values as well. *See, e.g.*, Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U.CHI.L.REV. 28 (1976). Occasionally, members of the Supreme Court have suggested relevant other factors as well. *Cf.*, Brock v. Roadway Express, Inc., 481 U.S. 252, 274 n.2 (1987)(Stevens, J., dissenting)(suggesting different considerations apply when government affects "traditionally guaranteed" rights rather than "new property").

[318] *See* Mathews v. Eldridge, 424 U.S. 319, 343-44 (1976).

[319] *Id.*

[320] *Cf.*, Chemical Waste Management, Inc. v. EPA, *supra* note 120, 873 F.2d at 1484.

[321] *See, e.g.*, In the Matter of Ashland Oil, Inc., Floreffe, Pa. Facility, Docket No. PA-88-0001, Order denying motion for accelerated decision, dated May 14, 1990 (deciding that whether a change in oil tank size materially affected the potential for the discharge of oil into navigable waters was a disputed material fact requiring a hearing).

Unlike *Mathews* and similar cases, however, the asserted deficiencies in EPA's procedures do not directly relate to trial-type procedures involving direct and cross-examination of witnesses. Compared to many "informal" proceedings, EPA's proposed Part 28 procedures retain most of the trial-type procedures of a formal adjudication. This is not to say that there are not procedures that might increase accuracy of determinations.

The most obvious complaint with EPA's procedures is the identity of the Presiding Officer. The failure to assure that he or she is not involved in enforcement activities was the primary objection made in the public comments on EPA's proposed rule.[324] This objection has two aspects. First, the commenters believed that senior attorneys from the enforcement office would likely have a built-in enforcement bias or mind-set that would detract from being a neutral Presiding Officer. Certainly it conforms to ordinary experience that persons who have been enforcers for a substantial number of years tend to approach related legal issues from an enforcer's perspective. While it is not unheard of for federal or state judges, or even ALJs, to come from an enforcement background, at least once they have ascended the bench, they will not be called upon to continue to exercise an enforcement orientation. This is potentially different for EPA's Presiding Officers, who may continue to exercise enforcement office functions, so long as it is not on a case in which they are presiding. The second aspect of the commenters' objection is that Presiding Officers can continue to be evaluated for pay and advancement purposes by the enforcement office of EPA. One need not assume that Presiding Officers will curry favor with their supervisors by consciously making favorable rulings to fear that an unconscious anxiety of subtle reprisal might affect a close ruling.

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[322] *See* 33 USC §1319(g)(3)(1988)("the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."); 42 USC §9609(a)(3)(1988)(same); 42 USC §11045(b)(1)(C)(1988)(same); 33 USC §1321(b)(8)(Supp. III 1990)("the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require"); 42 USC §300h-2(c)(4)(B)(1988)("(i) the seriousness of the violation; (ii) the economic benefit (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require").

[323] The extent of economic benefit or savings resulting from the violation is determined by EPA according to its BEN computer model. *See generally* Libber, *Penalty Assessment at the Environmental Protection Agency: A View from Inside*, 35 S.D.L.REV. 189 (1990).

[324] *See* comments of American Paper Institute and National Forest Products Ass'n, August 30, 1991, at 2; Duquesne Light, August 30, 1991, at 7; McDonnel Douglas, August 30, 1991, at 1; Chemical Manufacturers Ass'n, August 30, 1991, at 6; Barnes & Thornburg, August 30, 1991, at 1; Piper & Marbury for Edison Electric Institute, August 30, 1991, at 3, 10; Texaco, August 26, 1991, at 1; Eli Lilly, August 30, 1991, at 2; Coalition for Clean Air Implementation, August 30, 1991, at 7; Hunton & Williams for Utility Air Regulation Group, August 30, 1991, at 3; Cincinnati Gas & Electric, August 21, 1991, at 1.

The case law is clear that it is not a per se violation of due process to combine the functions of prosecutor and adjudicator.[325] The leading case on the subject, *Withrow v. Larkin*,[326] set a high threshold for claims of unconstitutional bias or prejudice. In challenging a particular adjudication, a complainant must "overcome the presumption of honesty and integrity in those serving as adjudicators" and must show "a risk of actual bias or prejudgment."[327] Consequently, the possible enforcement bias or enforcement "mind-set" of a Presiding Officer or the fact that the Presiding Officer might be subject to evaluation by enforcement personnel would not necessarily violate due process. Nevertheless, this does not rule out including such considerations as part of the *Mathews* factor, because they might affect the possible accuracy of determinations. By requiring the Presiding Officer to be an ALJ or an attorney not from or subject to enforcement personnel, EPA could eliminate this possible source of inaccurate determinations.

It should be noted that this possible threat to accuracy does not rely on the nature of the determinations to be made. Indeed, to the extent that the determinations are technical in nature, any enforcement bias or mind-set might increase the likelihood of inaccuracy by imbedding the Presiding Officer's EPA-orientation on technical issues.

Besides the absence of an ALJ as presiding officer, probably the other feature of the Part 28 procedures that most differs from a formal, APA adjudication is the inability of parties to comment on the presiding officer's proposed decision.[328] This also was a feature uniformly criticized by commenters on EPA's proposed rule.[329] In its preamble to the proposed rule even EPA drew attention to this decision.[330] EPA indicated that one case raises a due process concern about denying parties an opportunity to comment on proposed decisions, but EPA found that case to be distinguishable.

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[325] *See, e.g.*, Withrow v. Larkin, 421 U.S. 35 (1975); Chemical Waste Management, Inc. v. EPA, 873 F.2d at 1484 (finding EPA's Presiding Officer under Part 24 procedures not a violation of due process by reason of possible relationship to enforcement activities).

[326] 421 U.S. 35 (1975).

[327] *Id.* at 47.

[328] *Compare* Proposed 40 CFR §28.14, 56 Fed. Reg. 30026 (1991) *with* 5 USC §557(c) (1988).

[329] *See, e.g.*, Comments of American Paper Institute and National Forest Products Association, August 30, 1991, at 6; Comments of Duquesne Light, August 30, 1991, at 3; Comments of Piper & Marbury for Edison Electric Institute, August 30, 1991, at 19.

The one case is *Koniag, Inc., the Village of Uyak v. Andrus.*[331] In that case, the Secretary of Interior was responsible for determining the eligibility of Native Alaskan villages to obtain lands under the Alaska Native Claims Settlement Act (ANCSA). While the APA did not govern the means by which these determinations were to be made, the Secretary adopted procedural regulations that provided that initial determinations could be challenged in a *de novo* hearing before an ALJ. Under this procedure, parties were permitted to file proposed findings and conclusions to the ALJ, who in turn made a recommended decision to the Secretary. But, as the DC Circuit noted, "[a]t this point, the procedure veered from the usual course of administrative law."[332] The recommended decision was not filed on the parties, and the parties were not able to file exceptions to the recommended decisions. The DC Circuit held this to be a violation of due process. This conclusion derived from a combination of considerations. First, the Court, citing *Wong Yang Sung*, believed that the APA, and particularly §557(c), guides the requirements imposed by due process, where there are no other prescribed statutory requirements. Second, citing *Mathews v. Eldridge*, the court found that the great private interest involved and "the minimal cost to administrative expediency"[333] required the Secretary to allow parties to take exceptions to the ALJ's recommended decisions and to submit briefs thereon. Third, ANCSA's statement of congressional findings and purpose included the language that the settlement of native lands "should be accomplished...with maximum participation by Natives in decisions affecting their rights and property,"[334] and to deny Native Alaskans the ability to take exceptions from proposed decisions was inconsistent with this exhortation. Finally, while the parties were able to submit proposed findings of fact and conclusions of law to the ALJ, these submissions apparently were not included in the record that was submitted to the Secretary for the final decision.

Some of these considerations are not present under EPA's proposed rule. Thus, where Congress has explicitly ruled out the use of §§554, 556, and 557, it would seem inappropriate to use §557's procedures as a model to determine the contours of due process.[335] Moreover, under EPA's proposed rule, when parties are permitted to submit findings of fact and conclusions of law, they are to be part of the record submitted to the Regional Administrator.[336] However, EPA's proposed rule is less protective than the procedures in *Koniag* to the extent that it does not assure that parties will be able to submit findings of fact and conclusions of law at all. Instead, this is left to the discretion of the Presiding Officer.[337] Consequently, the failure to assure that parties will be able to submit *either* findings and conclusions *or* exceptions to a proposed decision makes the proposed rule much like the procedures in *Koniag*. EPA further distinguished *Koniag* in the preamble to its proposed rule by stating that there is no equivalent in the statutes creating the administrative penalties to ANCSA's exhortation to provide "maximum participation" to parties involved. Instead, Congress called for expedited enforcement procedures.[338] This is true, but it should be noted that ANCSA's statement of congressional findings and purpose also explicitly called for expedition, stating that the settlement process "should be accomplished...rapidly, with certainty, without litigation...."[339] The DC Circuit apparently did not perceive a requirement to allow parties to file exceptions from recommended decisions to interfere with this purpose of ANCSA.

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[330] *See* 56 Fed. Reg. 29998 (1991).

[331] 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978).

[332] *Id.*, at 605.

[333] *Id.*, at 609.

[334] 43 USC §1601(b) (1988).

[335] *See* Marcello v. Bonds, 349 U.S. 302 (1955).

Nevertheless, the most important consideration must be the *Mathews* analysis. Here, the DC Circuit's *Mathews* calculus in *Koniag* would seem quite comparable. That is, parties' interest in the penalty proceedings is of "great importance,"[340] and there seems little reason why the "minimal cost to administrative efficiency" in *Koniag*[341] would be any higher for EPA in penalty proceedings. Given the evidence that very few penalty cases ever get to the recommended decision stage,[342] to allow parties to file exceptions to recommended decisions would seem to have little effect on EPA's enforcement.

All this being said, *Koniag* does not seem to be a strong case upon which to rely for its due process analysis. The DC Circuit's activism in fine-tuning the agency's procedure in that case is out of character with more recent Supreme Court and circuit court cases. Whatever the merits of allowing comment on the Presiding Officer's recommended decisions,[343] it stretches the notion of fundamental due process to include such a technical requirement.

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[336] *See* Proposed 40 CFR §§28.2(b)(9), 28.26(k), 28.27(a)(2), 56 Fed. Reg. 30021, 30031-32 (1991).

[337] *See* Proposed 40 CFR §28.26(k), 56 Fed. Reg. 30031 (1991). Here is an example where the lack of a truly neutral Presiding Officer might have substantial impacts on the fairness and accuracy of the decisionmaking.

[338] 56 Fed. Reg. 29998 (1991).

[339] 43 USC §1601(b) (1988).

[340] *Koniag, supra* note 331, 580 F.2d at 609.

[341] *Id.*

[342] *See supra* text at note 306.

[343] *See infra* text at note 355.

More fundamentally, a number of other features of EPA's proposed regulation, which differ from what is provided in ordinary formal adjudications or even what is provided in many informal adjudications, might be said to affect the accuracy of the determinations. These were detailed at some length in Part III.[344] They include: EPA's shifting to the defendant of the burden of going forward to show why the requested penalty amount should not be granted, while prohibiting any discovery as to EPA's basis for the proposed amount and generally not allowing the defendant to introduce testimonial evidence as to penalty amount; serious constraints placed upon the Presiding Officer's exercise of discretion, including prohibitions on additional discovery beyond what is expressly provided in the regulation, on extending time for defendants to obtain information, and on the Presiding Officer dismissing EPA's complaint; very short page limits on parties' legal submissions; and short, strict deadlines for every step of the process, with default a threat at each stage. Individually, each of these limitations can be explained and perhaps justified. Indeed, an agency might be able to impose many of these limitations by rule on formal, APA adjudications of a particular type. Nonetheless, viewed together, especially in light of the lack of a functionally-neutral hearing officer and the inability to file exceptions to a proposed decision, one might conclude that there are a number of procedures which could be added to increase accuracy.

This raises the question of *Mathews'* third factor—the government's interest in not affording additional procedures. Here the EPA's interest in general is to reduce the time and cost involved in assessing penalties for violations. But this is not just an end in itself but also a means to more effective environmental regulation. The argument is that to the extent that EPA can only enforce its regulations against violators by means of formal proceedings, EPA's enforcement efforts will necessarily be substantially limited. Such a limitation will meaningfully reduce deterrence and predictably lead to more violations.[345] It was this very argument that convinced Congress to adopt the informal procedures.

If one assumes EPA's predicate to be true (that formal procedures necessarily would reduce enforcement), EPA's argument has substantial weight. Nevertheless, the implication of the argument may reduce that weight. That is, the same could be said for the War on Drugs or any other law enforcement activity. The less procedural constraints on agencies in their adjudication of law violations and assessment of penalties, the easier it will be for those agencies to enforce the law. This, however, cannot lead to a logical conclusion that elimination of all procedural constraints is justified by the increased effectiveness of law enforcement. Thus, while effective law enforcement certainly is a positive government interest worthy of consideration under *Mathews'* third factor, our conceptions of due process cannot give it overwhelming weight.

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[344] *See supra* text at notes 229-278.

[345] 56 Fed. Reg. 29998 (1991).

There is also a question of the accuracy of the assumption that EPA's Part 28 procedures reduce the time and cost of enforcement compared with formal procedures. The statistics quoted in Part IV of this article support EPA's view, but, as indicated there, it is not clear whether informal penalties take less time *because* of the informal procedures. Rather the persons involved in the process believe that the amount of money and inherent problems of the particular case are the determinative factors in governing the time and cost of the proceedings. The extent or existence of a causal relationship between the procedures prescribed and the length of time between proposal and final order has not been established and may be questioned, especially because so few of the cases, whether formal or informal, actually involve any adjudicatory proceedings. Absent a meaningful causal relationship between informal procedures and reduced time and cost of enforcement activities, the government's interest in the informal procedures becomes tenuous.

In assessing the government interest in avoiding additional procedures, it may be worthwhile to focus on the EPA's response to the primary complaint with the Proposed regulation. For example, why not use ALJs instead of Presiding Officers, if that would meaningfully increase accuracy?

Initially, there is some question whether ALJs are rightfully permitted to preside over non-APA adjudications, and many of these penalty provisions explicitly bar APA adjudications.[346] The source of the question is 5 USC §3105, which states that each agency shall appoint "as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges...may not perform duties inconsistent with their duties and responsibilities as administrative law judges." This language first suggests that an ALJ's responsibilities are to conduct proceedings under §§556 and 557 and, second, that to conduct other proceedings might be inconsistent with their duties and responsibilities.

This interpretation, however, is hardly compelled. Agencies do in fact use ALJs for non-APA proceedings.[347] Nevertheless, ALJs tend to jealously guard their prerogatives and their neutrality,[348] and if they can be compelled to conduct proceedings that are not the basis for their appointment, they may see this as an interference with their core duties. This would especially be true if the non-APA proceedings became a major or the major portion of their work. Inasmuch as EPA only has seven ALJs, were they to be used for the non-APA penalty proceedings, they might consider that additional work substantially burdensome.

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[346] *See, e.g.*, 33 USC §1319 (g)(2)(A) (1988).

[347] *See, e.g.*, *Koniag*, *supra* note 331, 580 F.2d 601.

[348] *See, e.g.*, Moss, *Judges Under Fire*, ABA Journal, November 1991, at 56.

Indeed, EPA has suggested that assigning all its Part 28 penalty proceedings to ALJs would "overwhelm" the agency's ALJs.[349] Assuming this to be true, EPA would not be able to appoint additional ALJs, because, as noted above, agencies are authorized to appoint ALJs only as necessary to conduct formal APA proceedings. Similarly, while 5 USC §3344 provides for the temporary assignment of ALJs from other agencies when an agency "occasionally or temporarily is insufficiently staffed" with ALJs, it would be extraordinary for the Office of Personnel Management to select ALJs for assignment to an agency for *non-APA* adjudications. Moreover, EPA, like other agencies, would also likely be leery of using Presiding Officers with no background in the substantive law being adjudicated. Consequently, there seem to be insuperable obstacles to routinely using ALJs for the informal penalty proceedings.

Nevertheless, it is not clear that other alternatives to assure neutral Presiding Officers are not available. One suggestion made by a commenter was that EPA use attorneys from the Office of General Counsel rather than enforcement. This would eliminate or neutralize an enforcement bias or mind-set. Another suggestion was that EPA use attorneys from different regions as Presiding Officers, presumably to avoid having the Presiding Officer subject to the evaluation of the Regional Counsel or Administrator. Other possibilities include making the Presiding Officer essentially a full-time position subject to the evaluation of the Regional Administrator. This would eliminate the Presiding Officer at least prospectively from the evaluation and responsibilities of the enforcement office.

The proposed Part 28 procedures do not preclude a Region from using one or another means to assure neutrality, but they do not require any more than that the Presiding Officer be "neutral to the controversy."[350] If greater neutrality of the Presiding Officer can be achieved without significant interference with EPA's operations or budget, it would seem advisable, if not compelled, for the agency to achieve that neutrality. Not only would such an increase in neutrality be desirable to increase both the reality and perception of fairness for their own sake, but it would also affect the *Mathews'* calculus with respect to other aspects of the informal penalty procedures. That is, as Paul Verkuil has recently reminded us,[351] Henry Friendly's monumental *Some Kind of Hearing*[352] suggests that due process can accommodate tradeoffs between the neutrality of the decisionmaker and the informality of procedures.[353] In short, the judicialization of administrative procedures is partially a response to a lack of true neutrality of the decisionmaker, the procedures constituting a felt need to constrain the decisionmaker. If, however, the decisionmaker is truly neutral, the same need to formalize the process does not exist, for we can trust to the fairness of the decisionmaker.[354]

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[349] *See* 56 Fed. Reg. 29998 (1991).

[350] 56 Fed. Reg. 30003 (1991). This is equally true of the procedures of the Corps of Engineers. *See* 33 CFR §326.6(a)(3)(v), (h)(3) (1991). The Coast Guard insures greater neutrality. *See* 33 CFR §1.07-15 (1991).

[351] Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 U.C.L.A. L.REV. 1341, 1362 n. 90 (1992).

If we similarly ask what is EPA's interest specifically in not having parties be able to file exceptions to the Presiding Officer's recommended decision, EPA would likely respond that allowing such exceptions would interfere with Congress' desire for streamlined and expedited procedures.[355] Again, however, given the incredibly small number of cases that reach a recommended decision stage, it would seem that Congress' or EPA's desire for expedited procedures in general would be satisfied. Undoubtedly, providing for filing exceptions would take additional time for EPA's enforcement personnel as well as the Regional Administrator in deciding the case. If the defendant has pressed the case this far, however, the additional time and effort is not likely to be significant as a percentage of the total time and effort devoted to the case. Moreover, if the defendant has himself expended the time and effort to press the case this far, it would seem more likely that the defendant has a meritorious or, at least, contestable case. These cases probably should receive somewhat more attention.

In weighing the three *Mathews* factors in this case, it is clear that the private interest is great, and it is relatively clear that EPA could accede to many of the requests by commenters without significant cost to EPA or its enforcement efforts. At the same time, the additional procedures that might be included to reduce the risk of error, certainly individually, if not in combination, would likely have only a marginal effect. On their face, it is difficult to perceive the procedures *precluding* due process. If they were challenged as applied, the challenge might turn on the particular facts and circumstances of the case, including how the Part 28 procedures were implemented.

To assess the *Mathews* factors inevitably involves a fair amount of subjectivity. Where there are few if any cases on point, the task is even harder. Here there is one case which some might find comparable. That is *Chemical*

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[352] Friendly, *"Some Kind of Hearing"*, 123 U.PENN. L.REV. 1267 (1975).

[353] *Id.* at 1279.

[354] While the analytical force of this suggestion or argument cannot be gainsaid, it is a fact of administrative law that precisely the more neutral the decisionmaker the more formal the procedures. Thus, informal proceedings are invariably before agency employees not enjoying the protections of ALJs; formal adjudications are before neutral ALJs, even if formalistically they are employees of the agency; and the most formal proceedings, civil judicial trials, are before Article III judges.

[355] *See* 56 Fed. Reg. 29998 (1991).

Waste Management decided by the DC Circuit in 1989.[356] There, EPA had adopted a set of informal adjudicatory procedures to govern the issuance of certain corrective action orders to certain facilities which treat, store, or dispose of hazardous wastes.[357] Those procedures were like those under Part 28 in that they utilized the same Presiding Officer to preside at hearings, but they were unlike the Part 28 procedures in that they did not allow for the direct or cross-examination of witnesses by parties. Rather, the hearing was more like a legislative-type hearing, with the parties allowed to make presentations to the Presiding Officer and the Presiding Officer allowed to ask the parties questions. These procedures were challenged on their face as violative of due process.[358]

The court applied the *Mathews* test and upheld the informal procedure. As to the private interest, the court found that the financial stakes for potential defendants could vary widely, but there was no evidence that EPA was incorrect in expecting the great majority of cases to involve only small sums of money. Here, where the challenge was to the regulations on their face, the court indicated that judgments on the basis of a worst case were inappropriate. The court held open the possibility, however, that in an actual case where the impacts were particularly great, those impacts could be factored into the *Mathews* calculus.[359]

The two primary claims as to the risk of error were that the failure to allow trial-like procedures and the use of an agency attorney instead of an ALJ increased the risk of error. The court rejected the first claim on the basis that the plaintiffs had failed to explain how trial-like procedures "will significantly advance the accuracy of an adjudicative process in which the issues typically do not require determinations of witness credibility but turn instead upon technical data and policy judgments."[360] The court noted that the same point had been made in *Mathews*.[361] As to the request for the ALJ, the court pointed out that in *Withrow v. Larkin*[362] the Supreme Court had established a stringent standard for an "as applied" attack on procedures that allow the combination of investigative and adjudicative functions. When the attack is a facial one, the court concluded that it is impossible to find the actual bias or prejudgment that the Court found necessary for a constitutional violation.

As to the government's interest, the court accepted EPA's estimate that the informal procedure would save half the cost of a formal, APA hearing, and that the cost of formal procedures would significantly impair EPA's ability to enforce the statute. Interestingly, the court did not address EPA's further, and perhaps more compelling, argument that most corrective action orders would involve regulatory violations threatening the public health and safety, so that informal procedures to speed up the process were justified by the need for expedition.[363]

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[356] 873 F.2d 1477 (D.C. Cir. 1989).

[357] *See* 40 CFR Part 24 (1991).

[358] The procedures were also challenged on the grounds that the statute implicitly required formal adjudication under the APA. This argument was rejected by the DC Circuit, applying a *Chevron* analysis. *See* Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984).

[359] Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477, 1484 (D.C. Cir. 1989).

[360] *Id.*

[361] *Id.*, citing 424 U.S. at 343-44.

[362] 421 U.S. 35 (1975).

Applying the *Mathews* cost/benefit analysis, the court found that "to the modest extent that EPA's [informal procedures] do implicate the private interest in avoiding the expense of unnecessary corrective actions, formal procedures do not promise a sufficient lowering of the risk of error to justify their significant expense to the Government."[364]

While much of the DC Circuit's analysis seems transferable to EPA's Part 28 procedures, which after all are substantially more trial-like than those upheld in *Chemical Waste Management*, there still may be some significant differences. First, unlike corrective action orders, which do not necessarily indicate that the defendant violated any law, orders assessing penalties necessarily stigmatize the defendant as a law-violator.

Second, and more importantly, EPA itself distinguished Part 24 corrective action orders from "RCRA 3008(a) compliance orders."[365] "RCRA 3008(a) compliance orders" may include civil penalties of up to $25,000 per day.[366] These orders, EPA said, were more likely to involve factual issues such as "questions whether certain events or violations occurred, the timing of certain events/violations, the seriousness of the violation, [and] the economic benefit to the respondent of the violation."[367] These characteristics would seem equally applicable to penalty proceedings under the various statutory provisions to be enforced under Part 28. In addition, whereas the court in *Chemical Waste Management* might note the imperfect fit between direct and cross-examination of witnesses and the "technical data and policy judgments" involved in corrective action order proceedings,[368] here the additional procedures commenters seek are more responsive to the nature of the issues. Thus, the desire to file exceptions to the recommended decision, the objection to the procedure for the penalty phase of the proceeding, and the short page limits for legal and policy arguments, for example, all arguably would be means of increasing accuracy more directly tailored to the nature of disputes likely to arise.[369] Moreover, *Chemical Waste Management*'s analysis of the lack of strict neutrality of the Presiding Officer, while accurate as a response to a due process challenge based solely upon the hearing officer's alleged bias or prejudgment, simply is not responsive to the inclusion of the lack of strict neutrality into the *Mathews* analysis.

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[363] *See* 53 Fed. Reg. 12256, 12257 (1988). The court in its *Chevron* analysis rejected EPA's argument that the legislative history behind the corrective action provisions indicated a legislative intent that the proceedings be expedited. *See* Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477, 1483 (D.C. Cir. 1989). However, whether or not Congress specifically intended informal procedures so as to quicken the response time to releases of hazardous waste, if informal procedures do in fact expedite such responses, it would seem that for the *Mathews* analysis an important government interest in the informal procedures would be the need to expedite responses to releases of hazardous waste.

[364] Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477, 1485 (D.C. Cir. 1989).

[365] 53 Fed. Reg. 12256, 12257 (1988).

[366] *See* 42 USC §6928(a)(1) & (3) (1988).

[367] 53 Fed. Reg. 12256, 12257 (1988).

[368] Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477, 1484 (D.C. Cir. 1989).

With respect to the Government's interest, it is clear that with respect to penalty assessments there can be no claim that health and safety considerations suggest expedition. There is, nevertheless, a clear similarity between EPA's claims in promulgating Part 24 under RCRA and Part 28, when it stated that requiring formal, APA proceedings would "enormously increase the costs and personnel time incurred for such hearings and cause significant delays. It would decrease the important deterrent value of these enforcement efforts and potentially cripple enforcement efforts Agency-wide by overwhelming the Agency's administrative law judges."[370] As indicated earlier, however, this claim is easy to make; it is more difficult to substantiate, especially given the infrequency with which hearings on the merits actually take place.

Chemical Waste Management cannot, accordingly, be deemed dispositive of the due process adequacy of Part 28. Nonetheless, its thrust is clear, and it is consistent with the general lack of serious due process challenges to the Coast Guard's informal penalty procedures. Indeed, one must conclude that if a court were to strike down Part 28's procedures as inadequate under the due process clause, it would likely be headline news in the administrative law world. This should not, however, make EPA sanguine about its prospects if the regulations were seriously challenged. Part 28 is sufficiently different from procedures challenged before, particularly in the very notion that "penalties" are involved and the fact that the decision rendered is final, not interim, to make any prognostication difficult.[371]

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[369] As indicated earlier, *see supra* note 97, the traditional notion that the purpose of a hearing was to address contested facts, not questions of law, was premised on the notion that courts decided questions of law *de novo*, whereas they deferred to agency determinations of fact. Hence, unless the court was to provide a trial *de novo*, the process for determining facts before the agency had to mimic a court's process. After the Supreme Court's decision in *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984), however, it appears that agencies can decide questions of law in a manner that effectively binds courts. If this is so, the post-*Chevron* concept of what process is due in an agency proceeding might include procedures whose purpose is to mimic court procedures for determining questions of law.

[370] 56 Fed. Reg. 29998 (1991).

[371] The author was invited to write the problem for the 1992 National Administrative Law Moot Court Competition and to judge in the final round of competition. One of the issues in the problem was a due process challenge to EPA's procedures under proposed Part 28 for imposing administrative penalties. After the competition was concluded and the prizes awarded, the author asked the other two final round judges, a federal district court judge and a federal magistrate, what their reaction was on the merits. Both expressed the view that the procedures were unconstitutional. Moot court is not real court, but the judges' initial reaction cannot be ignored.

B. Policy Issues

Assuming that due process is satisfied by the informal procedures provided in EPA's and the Corps' regulations, there remain policy questions raised by some aspects of those regulations. Again, the lack of assured neutrality of the Presiding Officer must be addressed. Whether or not ALJs are used, there are ways that EPA could better insulate the Presiding Officers from both the reality and appearance of enforcement oversight and influence. Some of these ways, such as making the job full time and not having the Presiding Officer rated by persons in the enforcement office, would be an inexpensive but effective method. The fact that most EPA regions and the Coast Guard have ensured greater neutrality demonstrates its feasibility.

Given the nature of the issues likely to be involved in EPA penalty proceedings, as well as the truncated papers allowed to be filed initially, there would seem to be positive value in allowing parties to file exceptions to the Presiding Officer's recommended decision. Concededly, this would add a significant amount of time to the proceeding, but the infrequency with which these proceedings will ever reach the recommended decision stage and the lack of need for speed in individual cases—as opposed to generally having these cases handled expeditiously—suggest this added time would not be a great burden. EPA appears to be seriously considering this issue, because it specifically asked for comments concerning it.[372] Again, the fact that the Coast Guard with its vastly greater number of cases can allow for the equivalent—an administrative appeal—suggests that allowing such comments would not meaningfully burden EPA.

A larger issue, and one beyond the control of EPA or the Corps of Engineers, is the requirement for providing an opportunity for public comment that is attached to the penalty provisions under Section 309(g) of the Clean Water Act and Section 300h of the Safe Drinking Water Act, as well as the Class II penalty provisions of the Oil Pollution Act.[373] There seems little question that this requirement complicates and extends the time necessary for completing even simple consent orders.[374] At the same time, there is virtually no evidence that the public participation requirements have resulted in any public participation. For the reasons indicated earlier,[375] this is not surprising, given EPA's method of notification. Nevertheless, even a more effective notification system seems highly unlikely to result in meaningful public participation in all but the most unusual case.[376] This suggests that the idea behind the public participation requirement was initially flawed, and probably the provisions should be repealed.

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[372] *See* 56 Fed. Reg. 29998 (1991). Subsequent to the publication of the proposed rule, EPA created a new administrative appellate body, the Environmental Appeals Board, which has been delegated the Administrator's authority with respect to the final agency decision on appeal from a number of agency adjudications, including all administrative penalties assessed by formal adjudication. *See* 40 CFR §1.25(e), 57 Fed. Reg. 5320 (1992). EPA should consider whether to allow appeals to this new body from its administrative penalty proceedings under proposed Part 28.

[373] *See supra* note 176.

[374] For example, a consent order cannot be signed before the period for public comments is over. *See* Proposed 40 CFR §28.22(b)(1)(i), 56 Fed. Reg. 30028 (1991).

The largest policy issue, again beyond the agencies' control, is the decision to create a non-APA adjudication for administrative penalties. It cannot be gainsaid that this decision in certain statutes has been the result of conscious congressional action, but that action has been inconsistent. First, there is inconsistency in the maximum penalty amount that can be assessed in an informal proceeding.[377] Second, there is inconsistency between what requires a formal adjudication and what does not.[378] Moreover, other than penalty amount, there is usually no distinguishing feature between when or under what circumstances the agency is to use informal as opposed to formal adjudication.[379] The inconsistency or irrationality between statutes is compounded by agency practice. Thus, EPA has formal procedures for certain orders and penalties,[380] informal procedures for certain orders,[381] and informal procedures for certain penalties.[382] In addition, the procedures applicable to violations of the same law and penalized under the same statutory provision may be governed by different procedures, depending upon which agency is doing the enforcement.[383]

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[375] *See supra* text accompanying notes 197-202.

[376] *See* letter from Kirk Cunningham, Water Quality Chair, Sierra Club, Boulder, Colorado, to the author (February 3, 1992)(on file with author), indicating the limited resources and time available and the need to focus only on big issues, not on details. "The administrative penalties business sounds like a detail to me."

[377] *Compare* 42 USC §7413(d)(3)(Supp. III 1990)(up to $5000 per day for violations of Clean Air Act) *with* 42 USC §300h-2(c)(1988)(up to $10,000 per day, not to exceed $125,000, for certain violations of underground injection control regulations under the Safe Drinking Water Act) *and*; 33 USC §1319(g)(2)(A)(1988)(up to $10,000 per violation, not to exceed $25,000 for violations of the Clean Water Act).

[378] For example, the administrative penalty provisions added to the Safe Drinking Water Act in 1986 authorized EPA to assess penalties by non-APA procedures of up to $10,000 per day (not to exceed $125,000) for certain violations of the underground injection control regulations and of up to $5,000 per day (not to exceed $125,000) for certain other violations of the underground injection control program. *See* 42 USC §300h-2(c) (1988). In the same amendment, however, Congress authorized EPA to assess only by formal, APA procedures penalties up to $5,000 for violations of compliance orders under the Safe Drinking Water Act's public water system regulations. *See* 42 USC §300g-3(g) (1988). Penalties for greater than $5,000 are required to be assessed by courts. *Id.*

[379] *See* 33 USC §1319(g)(1)-(3)(1988); 33 USC §1321(b)(6)(A) & (B), (8)(Supp. III 1990); 42 USC §7413(d)(1)-(3)(Supp. III 1990); 42 USC §9609(a)(1)(A)-(E), (b)(1)-(5)(1988).

[380] *See* 40 CFR Part 22 (1992)(general procedures for most APA adjudications); 40 CFR Part 27 (1992)(procedures for assessing penalties in program fraud).

[381] *See* 40 CFR Part 24 (1992)(procedures for issuing corrective action orders under RCRA); 40 CFR Part 142, Subpart J (1992)(procedures for issuing compliance orders under the public waters systems provisions of the Clean Water Act).

[382] *See* Proposed 40 CFR Part 28.

Why Congress has chosen to create a category of non-APA penalty procedures is not entirely clear. The agencies have requested it, they say, to avoid the cost and effort they believe is involved in formal adjudications. Congress has apparently accepted that representation. In the context of EPA's administrative penalty program, however, it is not clear that much cost and effort are in fact saved by instituting informal procedures. At one level this is due simply to the fact that most cases are settled before any meaningful hearing procedures have been utilized. There is no harm in a high settlement rate, but it might suggest that those few who do not settle may have a legitimate defense, one worthy of the requisite formalities to protect its effective articulation and proof.

The assumption underlying the creation of these new informal penalty provisions must be that APA adjudication, which was created as a more expeditious, less formal proceeding than its alternative—a judicial proceeding—is itself so cumbersome and immune to expedition that a new type of proceeding is required. Undoubtedly many hold this view, and neither it nor the reaction that results from it are limited to administrative penalty proceedings.[384] Nevertheless, this view and assumption need examination and confirmation.

The perception that formal, APA adjudication is complex, costly, and slow is widespread. It extends from Congress to the Casebooks.[385] Yet, if this perception is true, it is not necessarily due to the procedural requirements of the APA. Sections 554, 556, and 557 do not mandate long, drawn-out proceedings. Indeed, they allow for limiting depositions,[386] excluding irrelevant, immaterial, and unduly repetitious evidence,[387] for precluding cross-examination that is not required for a full and true disclosure of the facts,[388] and for deciding a case or issues therein by summary judgment.[389] There are no particular restrictions on an agency's ability to set deadlines for filing documents or holding hearings or to set page limits governing documents filed. Indeed, other than EPA's denial of the ability to file exceptions to a recommended decision, virtually all of EPA's procedural shortcuts in its proposed Part 28 could be adopted with respect to formal, APA adjudications. Nevertheless, the history of agencies attempting to expedite APA adjudications is not one to instill confidence in an agency proposing such an undertaking.[390]

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[383] For example, both EPA and the Coast Guard are authorized to assess administrative penalties for violations of Section 311 of the Clean Water Act, *see* 33 USC §1321(b)(6) (Supp. III 1990), but they have different procedures for informal penalty assessments. If the Coast Guard enforces the Hazardous Materials Transportation Act, 49 USCApp. §1809(Supp. III 1990), it uses its informal procedures under 33 CFR §1.07(1991), but if the Federal Aviation Administration enforces the same statutory provision, it uses formal, APA procedures, *see* 14 CFR §13.201(a)(2)(1991).

[384] A recent survey of non-APA hearing proceedings identified 129 types of cases for which hearings are provided but which are not APA hearings. Frye, *Survey of Non-ALJ Hearing Programs in the Federal Government, supra* note 279, at 264.

[385] In Gellhorn *et al.*, *supra* note 70, at 892, there is a picture of an ALJ literally surrounded by the record of one case. The caption, quoting from Fortune magazine reads in part:

> This paper mountain is only part of the testimony and documents pertaining to a single FPC gas case. The hearings to determine which new pipe line should be certified to serve midwestern markets ran for 143 days. Every one had his say *in extenso* and no doubt FPC hearing examiners like Edward B. Marsh, above, read each of the thousands of transcript pages.

However dated this particular example, its presence as the only picture in the most popular administrative law casebook reflects and reinforces the popular conception of formal adjudication. *See also* Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots*, Administrative Law News (American Bar Association Section of Administrative Law and Regulatory Policy) Spring 1992, at 1.

This history is fraught with conflicts between agencies and ALJs over ALJ independence.[391] However, rather than attempt by rule to structure an expedited proceeding, agencies have traditionally attempted to identify those ALJs who resolved significantly less cases than their peers and to take some remedial action against them.[392] These reviews almost of necessity involve evaluation of how the ALJ is doing his job and consequently are viewed by ALJs as interfering with their independence.

This history, however, does not indicate that ALJs are unresponsive to rules adopted by agencies governing adjudicatory procedures. Thus, were EPA, for example, to impose most of the requirements in its proposed Part 28 to formal, APA adjudications, many might question their wisdom or efficacy, but those requirements would not raise the issue of ALJ independence as evaluation programs have in the past. Even those requirements specifically aimed at controlling Presiding Officer discretion, such as the prohibition on granting any delay based on a party's request for information beyond that mandated in the rule, with disqualification of the Presiding Officer as a penalty for violation,[393] relate to open enforcement of clear rules of procedure by parties to the adjudication. Thus, it is not clear that expedited procedures could not be mandated by rule even in formal, APA adjudications.

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[386] 5 USC §556(c)(4)(1988).

[387] 5 USC §556(d)(1988).

[388] *Id.*

[389] 5 USC §554(e)(1988).

[390] Often the focus is not expedition generally but increased productivity of the ALJs. Invariably, attempts to evaluate or enforce productivity become caught up in charges of interference with the independence of ALJs. *See, e.g.*, Moss, *Administrative Law Judges Under Fire*, ABA JOURNAL, November 1991, at 56, 57-58. *See also* Nash v. Bowen, 869 F.2d 675 (2d Cir. 1989); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980). For a general review of attempts to evaluate ALJ performance, see *The Federal Administrative Judiciary*, The Administrative Conference of the United States (draft report, May 1992) at 152-162.

[391] *Id.*

[392] *See, e.g.*, Administrative Law Process: Better Management is Needed, Report to Congress by the Comptroller General of the United States (May 15, 1978).

[393] *See* Proposed 40 CFR §28.4(c)(4), 28.13, 56 Fed. Reg. 30024-25 (1991).

The difficulty lies in the fact that inevitably even the expedited procedure rules must allow discretion to the Presiding Officer. Thus, for example, EPA's proposed procedures can afford extremely short page limits for written legal arguments, because there is the loophole that the Presiding Officer can grant exceptions for good cause.[394] If the agency trusts the judgment of the Presiding Officer, it is more willing to provide for that discretion. Agencies, however, do not appear to "trust" ALJs to exercise that discretion in the manner desired by the agency, at least compared to other agency employees. That is, agencies expect the ALJs to exercise that discretion not according to the spirit intended in the regulation, as a necessary loophole to provide for the unexpected contingency, but according to their own lights as to the needs of justice. Other agency personnel, however, are viewed as more likely to reflect the institutional desires for expedited proceedings. Whether this perception is accurate is difficult to assess, but inasmuch as ALJs are not supposed to be "part of the team" for substantive purposes in the adjudication, it would not be surprising if they did not see as their mission furthering the agency's case management goals, as opposed to doing justice in some abstract sense. Thus, the agency is more likely to "trust" an employee other than an ALJ to internalize the agency's case management philosophy. Moreover, if this "trust" is not borne out, the agency is free to utilize a different employee as Presiding Officer, an option not available if an ALJ is required to be the hearing officer. Accordingly, the dynamics of ALJ independence conspire against an agency even by rule substantially expediting formal, APA adjudications.

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[394] *See* Proposed 40 CFR §28.8, 56 Fed. Reg. 30024 (1991).

Conclusion

When the procedures for formal adjudication were adopted in the APA, they were to be broadly applicable to the range of adjudications that were required to be made on the record after an opportunity for an agency hearing. The contemporaneous Attorney General's Manual makes clear that the applicability of Section 554 was not to be narrowly interpreted.[395] Moreover, its purpose was to provide uniform procedures for this class of hearings that were to be on the record.[396]

This broad applicability and uniformity of procedure has been seriously eroded, not just in the area of administrative penalties, but with respect to administrative adjudications generally.[397] On-the-record hearings not subject to Section 554 have proliferated in the law. The *Frye Report*[398] documents its extent.

Agencies clearly prefer non-APA adjudication. They lobby for it with Congress, and they interpret ambiguous statutory provisions to allow for it. Their motives are equally clear. One motive is overt—the wish to avoid the perceived complexity, cost, and delay associated with formal, APA adjudications. The other motive is more covert—the desire to exercise more control both procedurally and substantively over the adjudication process—especially by avoiding the need to use independent ALJs.

With respect to administrative penalties, the claim has been made that requiring formal adjudication would seriously harm enforcement efforts, because of the time and cost required by such adjudications. This claim, made to Congress, was not supported by any documentation contained in the legislative history. The evidence that only a relatively small number of cases actually require any hearing casts doubt on the accuracy of this claim. Moreover, as three Presiding Officers have written, "[i]n terms of procedural formality, these proceedings are the functional equivalent of hearings under the APA."[399] This suggests that EPA's informal procedures will not save any time or money compared to APA procedures. This is especially likely considering that EPA has not made any attempt to utilize expedited procedures under the APA.

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[395] *See* Attorney General's Manual on the Administrative Procedure Act, 91 (1947).

[396] *Id.* at 9.

[397] *See generally* Frye, *Survey of Non-ALJ Hearing Programs in the Federal Government, supra* note 279.

[398] *Id.*

[399] Letter to Nancy Miller, Administrative Conference of the United States, from Benjamin Kalkstein, Region III Presiding Officer, February 25, 1993, at 4; letter to Nancy Miller, Administrative Conference of the United States, from Steven Anderson, Region IX Presiding Officer, and Al Smith, Region VIII Presiding Officer, March 4, 1993, at 1.

As to the more covert motive, it is understandable why it is covert. An agency cannot come out and say that it prefers non-APA adjudications because it is easier for the agency to win if the proceeding is not governed by an independent ALJ. Nevertheless, this belief undoubtedly motivates part of the desire for non-APA adjudications. But this invidious concept of control is not the only aspect of control. Agencies may appropriately desire to control the procedure of adjudications, to ensure expeditious case management, so long as they do so by rules applicable to classes of cases, rather than by influencing hearing officers in particular cases. Attempts to expedite case handling by ALJs have not been notably successful under the APA, precisely because of the independence of ALJs, but agencies have not used procedural rules to limit the discretion of ALJs or to establish particular deadlines. Rather, agencies have tended to resort to oversight of particular judges, thereby raising questions as to interference with their independence. Until agencies have tried and failed to achieve expedition by using procedural rules governing APA proceedings, agency pleas for relief should be subject to doubt.

While this article has been skeptical of the need to except administrative penalty proceedings from the APA in order to achieve expeditious and efficient case handling, Congress has nevertheless accepted the argument, at least for "lesser" penalties. Congress too is interested in effective enforcement of its laws, and it has found that criminal and civil enforcement in the courts is time-consuming and expensive. Accordingly, Congress has increasingly provided for administrative orders and administrative penalties as alternatives to civil injunctions or penalties.[400] Within the universe of administrative penalties, there is a certain intuitive sense that if large penalty amounts can be assessed using formal, APA procedures, smaller penalty amounts should be able to be assessed using less formal procedures. Indeed, even defendants may prefer informal proceedings if they are cheaper but provide an adequate opportunity to defend oneself given the possible penalty to be inflicted. It is this distinction between greater and lesser penalties associated with more elaborate and less elaborate procedures that seems to characterize Congress' response to agency requests for informal penalty assessment procedures. That is, the "need" for non-APA procedures relates solely to the relatively smaller amount of the penalty to be imposed.[401]

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[400] *See, e.g.*, 42 USC §9606(a)(1988)(authorizing President to seek court injunction or to issue an order to protect the public health and welfare and the environment); 42 USC §9609(a)-(c) (1988)(providing for informal and formal administrative penalties and civil penalties assessed by court; the amount and standards for penalties identical between formal adjudication and judicial imposition).

[401] Unfortunately, Congress is not consistent with respect to what lesser penalties are, *see supra* note 377, and Congress' idea that "lesser" or "minor" penalties can reach six figures may not accord with common understandings.

If informal adjudications for orders and penalties are to become widespread, Congress would do well to consider an amendment to the APA. At present, each agency is required to reinvent the wheel with only the vague contours of due process and *Mathews v. Eldridge* as a guide. Despite the lack of serious judicial challenge to the Coast Guard's informal administrative penalty procedures in the past, expansion to other agencies and programs of non-APA penalty assessment power is likely to spawn new challenges.[402] This all involves substantial transaction costs to widespread use of informal adjudications for on-the-record hearings. An amendment to the APA to provide in addition for a less formal or non-ALJ adjudication could further the original goals of the APA's adjudication provisions: to provide uniformity in the law and to enact "a formula upon which opposing social and political forces have come to rest,"[403] thereby earning the respectful consideration of the courts.

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[402] *Cf.*, Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991)(*en banc*) (holding EPA's lien procedure under Superfund a violation of procedural due process).

[403] Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950).

Report for Recommendation 93-2

Review of PCA Decisions

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

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Introduction

The convulsion in the banking industry[1] is now subsiding as banks and even S&Ls have returned to profitability.[2] Whether the causes of the recent crisis have been arrested or whether the spate of bank and S&L failures will prove to be only one episode symptomatic of deeper structural problems destabilizing the banking industry is difficult to determine at this stage. What is clear is that the relationship between banking institutions and their regulators has been deeply changed.

Peering into the fog of the recent past, at the commentary of jurists writing not much more than three decades ago, we are reminded of just how profound has been the transformation. The cooperative style of supervision by the banking regulators of the industry was once celebrated by distinguished academicians[3] and the Supreme Court, which attributed the "virtual disappearance of bank failures" to the continuous and close, yet largely informal, system of banking regulation.[4] During the past five years these vestiges of the associational ideal have been vilified in the storm of public criticism and recrimination that accompanied the painful need to recapitalize the federal deposit insurance funds for banks and thrifts. Two major statutes—in 1989[5] and 1991[6]—have reconstituted the terms upon which the four principal federal banking regulators may now interact with the industries within their charge.[7] In 1989 the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) conferred upon the banking agencies massive new enforcement powers, and Congress ordered the recipients to use these powers "aggressively."[8] In 1991 Congress went much further in enacting new agency-forcing measures designed to eliminate the perceived reluctance on the part of the agencies to take early and decisive action against troubled banking institutions and their owners, directors and employees. This report focuses on the 1991 statute.

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[1] "Banking" is used in this report as a term of convenience to refer to the savings and loan (S&L or "thrift") and commercial banking industries. The federal deposit insurance funds for both industries have required extensive recapitalization after having being depleted by the massive round of S&L and bank failures, and while the causes of failure for each industry are complex and not identical, their combined effect has been to generate a common political response, both in Congress and in the Administration.

[2] The Federal Deposit Insurance Corporation (FDIC) has reported that federally insured commercial banks "recorded their four highest-ever quarterly profits in 1992, resulting in record annual earnings of $32.2 billion." FDIC, *Assessments*, 58 Fed. Reg. 17533, 17534 (Apr. 5, 1993) [hereinafter referred to as "FDIC, *Assessments*"]. The FDIC also reported that the number of "problem banks" was at its "lowest year-end level since 1983." *Id.* at 17534. As far as federally insured S&Ls are concerned, the FDIC reported that "much of the industry has shown consistent improvement over the past year," although it was also noted that "a number of problem institutions remain." *Id.* at 17539. *See also BIF-Insured Commercial Banks Pull in Record Profits in 1992*, 60 Banking Rep. (BNA) 334 (1993); *Thrifts Earn $1.12 Billion in Fourth Quarter 1992, For Record Year, OTS Says, id.* at 346.

[3] *See, e.g.*, 1 K.C. Davis, Administrative Law Treatise §4.04, 247-48 (1958) (describing the highly informal regulatory system as "superior in its efficiency" and "one of the most successful" systems of federal regulation). *See also* Administrative Procedure in Government Agencies, Monograph of the Attorney General's Comm. on Admin. Procedure, part 9, Federal Reserve System, S. Doc. No. 186, 76th Cong., 3d Sess. (1940) 31; *id.*, part 13, Federal Control of Banking: Comptroller of the Currency and Federal Deposit Insurance Corporation, at 18 (urging the federal banking agencies as a special case requiring less procedural formality in the administrative process).

[4] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 330 (1963).

[5] Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, 103 Stat. 183 (1989).

[6] Federal Deposit Insurance Corporation Improvement Act, Pub. L. No. 102-242, 105 Stat. 2236 (1991).

The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) introduced, as one of the central strategies designed to prevent further bank failures, the requirement that the federal banking agencies take "prompt corrective action to resolve the problems of [federally-]insured depository institutions."[9] The purpose of the subtitle in FDICIA that creates the prompt corrective action (PCA) system is "to resolve the problems of insured depository institutions at the least possible long-term loss to the deposit insurance fund."[10] The subtitle added a new section 38 to the Federal Deposit Insurance Act (section 38), which requires the banking regulators to take PCA action designed to preempt the possibility that a bank or savings association might fail or, if failure appears to be likely or inevitable, to seize the institution early enough to ensure that there remain assets within the institution sufficient to cover the institution's liabilities. Section 38 imposes a wide range of early intervention responsibilities on the banking agencies, and it prescribes, according to the capital classifications into which the institutions are placed, a number of restrictions on depository institutions and individuals.

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[7] The regulatory structure is as follows: the Board of Governors of the Federal Reserve, an independent federal government agency, has primary federal responsibility for the regulation of all bank holding companies, state-chartered banks that are also members of the Federal Reserve System, and foreign banks, branches and offices; the Federal Deposit Insurance Corporation, also an independent federal agency, administers the Bank Insurance Fund (for commercial banks) and the Savings Association Insurance Fund (for S&Ls), has primary responsibility for the federal regulation of all state-chartered, nonmember, federally insured banks, and has secondary regulatory authority over all other federally insured banks and thrifts; the Office of the Comptroller of the Currency, a bureau within the U.S. Department of the Treasury headed by the Comptroller of the Currency, charters and supervises all national banks; and the Office of Thrift Supervision, another bureau in the Treasury Department headed by a Director, charters all federally chartered S&Ls and supervises all savings and loan holding companies and federally insured savings associations (whether state or federally chartered). *See* 12 USC §§1813(q) (definition of "appropriate Federal banking agency") and 1818(t) (secondary regulatory authority of FDIC in case of all federally insured banks and thrifts).

[8] Conference Report to Accompany H.R. 1278, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, H.R. Rep. No. 101-222, 101st Cong., 1st Sess. 440 (1989). These powers were further augmented in 1990 in the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act, which was enacted as part of the Crime Control Act, Pub. L. No. 101-647, 104 Stat. 4789 (1990).

[9] FDICIA §131(a), adding to the Federal Deposit Insurance Act (FDI Act) a new §38(a)(2), 12 USC §1831o(a)(2).

[10] FDI Act §38(a)(1), 12 USC §1831o(a)(1). For a review of the thinking behind the prompt corrective action concept, *see* Richard Scott Carnell, *A Partial Antidote to Perverse Incentives: The FDIC Improvement Act of 1991*, 12 ANN. REV. BANKING L. 317 (1993).

While it makes provision for limited procedural protection for an individual who is dismissed from office as a result of a PCA directive, section 38 makes no direct provision for administrative review of PCA decisions, nor does it expressly provide for—or preclude—judicial review of PCA determinations. The federal banking agencies have incorporated some administrative procedures into the rules implementing the PCA powers ("PCA Rules" or "Final Rules"),[11] and some other relevant, though limited, administrative review provisions are also available.[12] Neither FDICIA nor the PCA Rules, however, make express provision for either administrative or judicial protection against possible misuse of some of the most basic and far-reaching of the PCA powers.

It is argued in this report that express provision should be made for limited administrative and judicial review in the case of the basic "capital classification" decisions upon which PCA is predicated. It is also argued that judicial review should be available to persons who have been dismissed as a result of PCA directives by the agencies, and to the institutions that are actually seized under section 38, and that the provisions governing such judicial review should be rendered uniform across all the relevant federal banking agencies. On the other hand, the report also concludes that, in all other cases involving the exercise of PCA powers, the administrative procedures already supplied by the federal banking agencies in the PCA Rules offer sufficient protection, and that in these cases judicial review should be expressly precluded.

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[11] Department of the Treasury, Federal Reserve System, Federal Deposit Insurance Corporation, *Prompt Corrective Action; Rules of Practice for Hearings*, 57 Fed. Reg. 44,866 (Sept. 29, 1992) (amending 12 CFR Pts 6, 19, 208, 263, 308, 325, and adding 12 CFR Pts 6 and 565).

[12] *See infra* Part III, Chart 1.

I. The Changing Context of Federal Banking Regulation

The combined effect of FIRREA and FDICIA, when superimposed upon a multitude of economic conditions that have intensified the vulnerability and fragility of depository institutions, has been to transform the regulatory landscape for banking. The particular matrices of federal banking regulation have been shaped by two basic, yet distinct, models that one commentator has termed *prophylactic* and *prudential* regulation.[13] In the earlier phases—from the inception of national banking in 1863 to about the early 1970s—the prophylactic model was dominant. Bank regulation was patterned primarily upon a series of barriers or prohibitions, designed to control entry into banking and to channel banks and thrifts into certain activities. At the same time, these institutions were barred from other activities deemed by Congress to be *inherently* unsafe, no matter how well placed any individual bank might perhaps be to engage in that activity. The classic example of such a prohibition has been the Glass-Steagall Act, aptly described by two authors as a "legal Maginot Line."[14] During the relatively tranquil period from the enactment of Glass-Steagall in 1933 until the late 1970s, banks and thrifts were happy to operate under the network of prophylactic constraints erected by Congress and the regulators, despite the wooden character of these constraints, because, enjoying significant immunity from nonbank competition in those activities that were reserved for them, they enjoyed the benefits of a government-sponsored cartel, receiving in return for severe operating restrictions a reasonably stable stream of profits.[15]

Prophylactic regulation was not, of course, the exclusive form of banking regulation, even during this period. Banks could fail if management or misfortunes were bad enough. Hence prudential regulation has also played a role in federal banking regulation, particularly with the inception of federal deposit insurance in 1933. From at least 1933, the regulators were given the power to implement safety/soundness regulation in order to prevent violations of law or unsafe and unsound practices.[16] And safety/soundness regulation became an important aspect of regulatory supervision. But throughout the period under consideration this form of regulation assumed a highly informal and cooperative character. Bank examiners and even their superiors in the regional offices and in Washington tended to rely heavily on discussion, persuasion and other nonadversarial methods for deterring the institutions under their supervision from imprudent activities. They never even possessed the power to take injunctive formal enforcement action until 1966 (when the banking regulators were given cease-and-desist powers[17]). Informal prudential regulation was effective because it was woven into a fabric of tough prophylactic regulation.

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[13] HELEN A. GARTEN, WHY BANK REGULATION FAILED xvi-xvii (1991).

[14] JONATHAN R. MACEY & GEOFFREY P. MILLER, BANKING LAW AND REGULATION 496 (1992). *Cf.* Securities Industry Association v. Board of Governors of the Federal Reserve System, 468 U.S. 137, 157 (1984) ("[Glass-Steagall's] prophylactic prohibition on underwriting reflects Congress' conclusion that the mere existence of a securities operation, 'no matter how carefully and conservatively run, is inconsistent with the best interests' of the bank as a whole" (quoting from a quote made by Sen. Bulkley in his remarks during the passage of Glass-Steagall)).

[15] *See* Geoffrey P. Miller, *Anatomy of a Disaster: Why Bank Regulation Failed,* 86 NORTHWESTERN U. L. REV.742, 747 (1992) (book review).

[16] *See, e.g.*, the Banking Act of 1933, §30, Act of June 16, 1933, ch. 89, 48 Stat. 193 (empowering the Comptroller of the Currency to certify directors or officers of national banks to the Federal Reserve

New forces emerging from the late 1960s began to destabilize the regulatory matrix.[18] Banks and thrifts experienced increasing competition from other segments of the financial services industry. Technological and conceptual innovation made more attractive substitutes available to bank customers, and depository institutions experienced large-scale disintermediation. Unable to compete, whether by reason of the restrictions on the activities permitted to them or because they were caught under interest-rate ceilings, banks and thrifts clamored for deregulation in order to survive. State governments and Congress responded during the early 1980s by loosening the restrictions on their activities and even breaking down the barriers between banks and thrifts themselves.[19] Prophylactic regulation receded as new activities and opportunities were opened up to banks and thrifts, and these institutions were permitted in many cases to decide for themselves whether and to what extent they should compete with money market mutual funds, invest in real estate ventures, and engage in other forms of financial services and investments.

With increased opportunities comes increased risk, exacerbated by an enhancement of the moral hazard of deposit insurance that had come about as a result of Congress' having increased the limits of such insurance quite

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Board for the institution of removal proceedings for persistent violations of law or unsafe or unsound practices).

[17] Financial Institutions Supervisory Act, Pub. L. No. 89-695, 80 Stat. 1028 (1966).

[18] The essential causes of the S&L and banking crises have been the subject of considerable public debate. Congress appointed a bipartisan National Commission on Financial Institution Reform, Recovery and Enforcement to produce an official post mortem, *see* the Crime Control Act of 1990, Pub. L. No. 101-647, §§251-58, 104 Stat. 4789, 4889-92. At the date of this report the commission's task was not yet complete. For a progress report, *see S&L Commission May Recommend Merger of Bank-Thrift Insurance and Regulator*, 60 Banking Rep. (BNA) 102 (1993). For a helpful, recent and brief analysis, *see* William B. Stevenson, *Current Problems in the Financial System May be Laid Directly at Feet of Politicians*, Am. Banker, May 3, 1993, at 4. *See also* the texts cited in note 21 *infra*.

[19] *See, e.g.*, Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (mandating the phasing out of interest rate controls and permitting banks and thrifts to offer NOW accounts); Garn-St. Germain Depository Institutions Act of 1982 , Pub. L. No. 97-320, 96 Stat. 1469 (increasing the amounts of loans that banks and thrifts could make to one borrower and allowing thrifts to engage in agricultural and commercial lending, accept demand deposits, offer money market accounts, make increased amounts of consumer loans).

dramatically in 1980.[20] One might have expected that the decline in prophylactic regulation would have been accompanied by an intensification in the prudential regulatory efforts of the banking agencies in order to counteract the increased dangers of abuse and failure that the new, more liberal banking environment created. But the intensification did not occur. Instead some state governments and the federal government itself *cut back on* safety/soundness regulation as part of programs designed to reduce government expenditure and accord regulatory "forbearance" to a thrift industry that was experiencing steadily increasing difficulties in the adverse regional economic climates in which many of its constituents were located.[21] Thus, by the late 1980s, when the cost of the spate of thrift and bank failures began to dawn on the public, Congress and the Administration were faced with a situation in which *both* prophylactic and prudential regulation of banking had been substantially impaired.

The reaction was to attempt to reinstitute some minor forms of prophylactic regulation, for example, in the form of controls over the kinds of activities permitted to state-chartered depository institutions.[22] More importantly for present purposes, however, Congress and the Administration chose to intensify many forms of prudential regulation. But this intensification changed the *character* of the regulation that was to be performed by the agencies. In FIRREA, the scale by which the agencies' enforcement powers were enhanced seems to have represented, at least in part, an effort to ensure that, even where the regulators lacked the capacity to perform the kind of plenary supervision that the hazardous modern world of banking warranted, the deterrent effect of the sanctions available would induce a degree of self-restraint on the part of depository institutions and their participants. In the years since the enactment of FIRREA, the balance in enforcement has shifted markedly from informality to formality. Enforcement activity has been driven by Congressional insistence upon expeditious, forthright and decisive regulatory supervision to intrude more deeply than ever before into the entrepreneurial preserves of the banking industry.

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[20] Federal deposit insurance was increased from $40,000 to $100,000. Depository Institutions Deregulation and Monetary Control Act, Pub. L. No. 96-221, 94 Stat. 132 (1980).

[21] Although the now-defunct Federal Home Loan Bank Board, which exercised forbearance instead of closing failing and dead thrifts, received the blame for this policy, it was in fact partly authorized by Congress itself, and it was certainly encouraged by many members of Congress, representing the interests of their constituents. *See generally, e.g.*, Department of the Treasury, Modernizing the Financial System: Recommendations for Safer, More Competitive Banks I-20, I37-38 (1991); L.J. White, THE S&L DEBACLE: PUBLIC POLICY LESSONS FOR BANK AND THRIFT REGULATION 139-42 (1991); M. Mayer, THE GREATEST-EVER BANK ROBBERY: THE COLLAPSE OF THE SAVINGS AND LOAN INDUSTRY 156 (1990); E. Kane, THE S&L INSURANCE MESS: HOW DID IT HAPPEN? 51-57 (1989); M. Lowy, HIGH ROLLERS: INSIDE THE SAVINGS AND LOAN DEBACLE 269 (1991).

[22] *See, e.g.*, FDICIA §303, adding new FDI Act §24 (containing restrictions on the ability of state-chartered depository institutions to engage in activities not permitted to their federally chartered counterparts without FDIC approval).

Where banks and thrifts have got into difficulties or have failed, the effect has been to subject many of the business judgments of their management to scrutiny through the enforcement process, thereby producing a kind of "entrepreneurial state" in which discretionary business decisions have become the subject matter of agency enforcement determinations.[23] FIRREA accelerated the trend toward formalism in other ways as well. Among the most important of these was the exposure of enforcement proceedings, which had until 1989 almost always remained confidential, to the glare of publicity and aggregate monitoring.[24]

With the enactment of FDICIA 2 years later, the character of prudential regulation has been further formalized. The regulators were required by the Act to develop generally applicable standards of safety and soundness, rather than merely being permitted to employ ad hoc discretion with respect to the activities of individual institutions.[25] And, of course, the PCA system was introduced in order to ensure that agencies not only should act to prevent and deter unsafe and unsound conduct but also that they should act *in particular ways.* At certain points of the process, the regulators are required—not merely permitted—to take certain actions including outright seizure of the institutions concerned. In addition, in order to ensure that the agencies should observe scrupulously the dictates of the statute, FDICIA included provision for an "inquest"[26] to be conducted by the relevant agency's inspector general whenever an insured depository institution causes "a material loss" to the insurance fund.[27] The inspector general's report is to be made public[28] and is to be followed by a General Accounting Office review and spot-check audit.[29] The obvious intention behind these provisions is to render the agencies even more accountable to Congress and the public.

As a result of all these developments, the atmosphere in which the agency/industry interaction takes place has become imbued with greater formality than ever before, and while broad or unconfined agency discretion might be conducive to regulatory expedition and convenience, the severity of the powers the regulators wield and the pressures under which they must wield them counsel strongly in favor of providing appropriate protection against the potential abuse of these powers. It is against this background that the adequacy of procedural protections for institutions and individuals subject to these actions should be assessed.

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[23] *See* Lawrence G. Baxter, *Judicial Responses to the Recent Enforcement Activities of the Federal Banking Regulators*, 59 FORD. L. REV. S193, S232-35 (1991).

[24] *See* FDI Act §8(u), 12 USC §1818(u) (requiring public hearings in enforcement actions and public disclosure by the federal banking agencies of final enforcement orders, the underlying record, and, subject to limited exceptions, even informal settlement agreements, as well as the filing of a quarterly report on enforcement decisions with Congress). *See also* FDI Act §8(t)(5), 12 USC §1818(t)(5) (requiring the agencies to make semi-annual reports to Congress on their disposition of requests from regional offices for formal enforcement action).

[25] FDICIA, §132, adding a new section 39 to the FDI Act, 12 USC §1831p-1). *See* Lawrence G. Baxter, *The Rule of Too Much Law? The New Safety/Soundness Responsibilities of the Federal Banking Agencies*, 47 Cons. Fin. Quart. Rep. ___ (forthcoming, summer 1993).

[26] Carnell, *supra* note 10, 330.

[27] FDI Act §38(k), 12 USC §1831o(k). "Material loss" is defined as being the greater of $25 million or 2% of the institution's total assets at the time that the FDIC initiated financial assistance to the institution or was appointed its receiver. FDI Act §38(k)(2)(B).

[28] *Id.* §38(k)(4).

[29] *Id.* §38(k)(5).

II. The New Prompt Corrective Action Regulatory System

A. The FDICIA "Tripwire" System

The PCA framework is premised on a "tripwire" approach that had become popular with reformers by the beginning of 1991. The underlying idea is that the banking regulators should be able to take increasingly severe action, on a stage-by-stage basis, against a depository institution as the capital and soundness of the institution decline (i.e., as the institution crosses certain objectively defined capital and safety/soundness tripwires).[30] As finally formulated in FDICIA, the system relies upon three mechanisms for ensuring early regulatory resolution of troubled banks: capital measures; objective standards for measuring safety and soundness; and uniform, stringent accounting requirements.

1. Capital Classifications and Restrictions

a. Capital Classifications

Capital-to-asset Ratios. Under FDICIA's capital classification system, the regulators are required to adopt two separate *capital standards* for depository institutions under their supervision.[31] The first is a *leverage limit* ("LR"), which measures the ratio of an institution's equity to its total assets, and the second is a *risk-based capital requirement* ("R-BR"), which measures the ratio of an institution's capital to its total assets *after* they have been adjusted for risk. The agencies may also establish or rescind other relevant capital measures[32] and, in their Final Rules, the agencies have adopted an additional *Tier 1 risk-based capital ratio* ("T1 R-BR").[33]

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[30] *See, e.g.*, General Accounting Office ("GAO"), Deposit Insurance: A Strategy for Reform 61 (Mar. 1991).

[31] FDI Act §38(c)(1)(A).

[32] FDI Act §38(c)(B).

[33] *See, e.g.*, 12 CFR §325.103(a)(2) (FDIC).

Capital measures. These capital measures are then used as the criteria for defining five categories of institutions:[34]

- *well capitalized* institutions, which are institutions that "significantly exceed[] the required minimum level for each relevant capital measure" (now at or greater than R-BR 10.0% *and* T1 R-BR 6% *and* LR 5%)
- *adequately capitalized* institutions, which are those meeting "the required minimum level for each relevant capital measure" (at or greater than R-BR 8% *and* T1 R-BR 4% *and* LR 4% *or* 3% if composite CAMEL rating of 1[35] and no significant growth experienced or anticipated)
- *undercapitalized* institutions, which "fail[] to meet the required minimum level for any relevant capital measure" (less than R-BR 8% *or* T1 R-BR 4% *or* LR 4% *or* LR 3% and not experiencing or anticipating significant growth)
- *significantly undercapitalized* institutions, which are those "significantly below the required minimum level for any relevant capital measure" (less than R-BR 6% *or* T1 R-BR 3% *or* LR 3%)
- *critically undercapitalized* institutions, which are those that fail to meet any of the relevant capital measures. (This category is subject to a number of related qualifications[36] and currently comprises those institutions with a "ratio of tangible equity to total assets that is equal to or less than 2%").[37]

Safety/soundness reclassifications. In addition to the capital measures, another important criterion may be used for classification purposes. Where the appropriate agency determines that an institution is in an *unsafe or unsound condition*,[38] or where it *deems* the institution to be engaging in an *unsafe or unsound practice* because the institution has received a less-than-satisfactory

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[34] FDI Act §38(b)(1). The specific levels enumerated in the text are those stipulated in the agencies' final rules. *See, e.g.*, 12 CFR §325.103 (a)-(b) (FDIC).

[35] On CAMEL and related ratings, *see infra* text accompanying notes 101-106.

[36] *See* FDI Act §38(c)(3).

[37] Recent statistics regarding capital classifications are as follows:

Type of Institution	**Well Capitalized**	**Adequately Capitalized**	**Under Capitalized (Total - all 3 categories)**	**Critically Under-capitalized**
BIF-insured (12/31/92) (Commercial & savings banks) **Total: 11,875** **(11,461 commercial banks; 414 savings banks)****	11,051*	550	210*	18**
SAIF-insured (6/30/92) (S & Ls) **Total: 1,855****	1,523*	341*	172*	11**

Sources: *FDIC, *Assessments*, *supra* note 2, at 17538 (Table 4) (as at 12/31/92), 17540 (Table 6) (as at 6/30/92);

**60 Banking Rep. (BNA) 334 (Mar. 15, 1993) (as at 3/9/93).

Separate statistics regarding significantly undercapitalized institutions were unobtainable.

[38] FDI Act §38(g)(1).

rating for asset quality, management, earnings, or liquidity, which it has failed to correct,[39] the agency may, regardless of the institution's actual capital level, reclassify a well capitalized institution as "adequately capitalized," use the powers relating to undercapitalized institutions against the institution even if it is "adequately capitalized," or use the specific PCA powers available against a significantly undercapitalized institution where the institution is actually only undercapitalized.[40]

It is difficult to estimate how significant the safety/soundness criteria will prove to be in the classification process, but some indication may be gained from the number of banks on the regulators' "problem lists." The FDIC has recently reported that 787 commercial banks and 76 savings banks remain on the agency's "Problem List."[41] While this represents less than ten percent of the total number of banking institutions, the statistic suggests that safety/soundness reclassifications will constitute a significant threat for a significant number of institutions.[42]

b. PCA Restrictions and Directives

The capital categorization system is used in FDICIA to identify both some benefits and the potential PCA exposure for depository institutions. On the plus side, well capitalized institutions enjoy the advantage of being able to accept brokered deposits.[43] If they are "well managed" and below a certain size, they are subject to less frequent on-site examination,[44] and they are permitted to continue conducting insurance activities under certain circumstances.[45] But the categorizations are principally for the purpose of imposing restrictions on institutions and prodding the regulators to take the range of actions stipulated in section 38.

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[39] *Id.*, read with §8(b)(8) (added by FDICIA §131(c)). Section 8(b)(8) reads:

> If an insured depository institution receives, in its most recent report of examination, a less-than-satisfactory rating for asset quality, management, earnings, or liquidity, the appropriate Federal banking agency may (if the deficiency is not corrected) deem the institution to be engaging in an unsafe or unsound practice for the purpose of this subsection [i.e., for cease-and-desist order purposes].

On examination ratings, *see* text accompanying notes 101-106.

[40] FDI Act §38(g)(1)(A)-(C).

[41] FDIC, *Assessments, supra* note 2, at 17534.

[42] The same appears to be the case for thrifts. Although it reported that there were still a number of "problem" SAIF-insured thrifts, *id.* at 17539, the FDIC did not give specific figures. Separately, however, the OTS reported that at the end of the fourth quarter, 1992, 330 thrifts had a MACRO rating of "3," and a further 200 a MACRO rating of "4" or "5," indicating that approximately 530 thrifts were exposed to safety/soundness reclassification. *See* 60 Banking Rep. (BNA) 346 (1993). As to the significance of such ratings, *see infra* text accompanying notes 101-114.

[43] FDICIA §301(a), amending FDI Act §29(a), (e), 12 USC §1831f; *see also* FDIC, *Unsafe and Unsound Banking Practices*, 57 Fed. Reg. 23933-01 (June 5, 1992) (implementing, as 12 CFR § 337, FDICIA §301).

[44] FDICIA §111(a), adding new FDI Act §10(d)(4), 12 USC §1820(d)(4).

[45] FDICIA §303(a), adding new FDI Act §24, 12 USC 1831a note.

Some restrictions apply across the board. For example, no institution may distribute dividends or pay management fees where the effect would be to cause the institution to become undercapitalized.[46] Most restrictions, however, focus on the three categories of undercapitalized institutions, with the degree of restrictive intensity increasing as one moves from the undercapitalized to the critically undercapitalized categories. All undercapitalized institutions are subject to increased monitoring[47] and to growth, branching and new business restrictions,[48] and all must develop and implement capital restoration plans acceptable to their regulators.[49] Companies having control of such institutions are required to guarantee compliance with such plans,[50] up to 5% of the institution's total assets.[51] All undercapitalized institutions are subject to a range of specific, far-reaching discretionary powers that may be exercised by the regulators where they deem such actions to be necessary.[52] Under these powers, the agencies may, for example:[53]

- require the institution to be recapitalized through a share issue, merger or acquisition;
- restrict transactions with affiliates (regardless of any exemptions permitted under the Federal Reserve Act);
- restrict the rate of interest the institution pays on deposits;
- restrict the rate of growth of the institution's assets;
- restrict any of the institution's or its subsidiary's activities that pose "excessive risk to the institution;"
- improve management by requiring the election of a new board of directors, the dismissal of directors or senior executive officers, or the employment of "qualified" senior executive officers approved by the agency;
- require divestiture, either by the depository institution of its subsidiary or by the parent company of the depository institution or an affiliate;
- require the depository institution to "take any other action that the agency determines will better carry out the purpose of this section than any of the actions" already specified;

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[46] FDI Act §38(d).

[47] *Id.* §38(e)(1).

[48] *Id.* §38(e)(3)-(4).

[49] *Id.* §38(e)(2).

[50] *Id.* §38(2)(C)(ii).

[51] *Id.* §38(e)(2)(E).

[52] *Id.* §38(e)(5).

[53] *Id.* §38(2).

- place the institution in conservatorship or receivership if it "has no reasonable prospect of becoming adequately capitalized," "fails to become adequately capitalized when required to do so," fails to submit a capital restoration plan, or materially fails to implement an approved capital restoration plan.[54]

While these powers are available for use against all undercapitalized institutions, one or more of them *must* be used when an institution falls into the "significantly undercapitalized" category or where an "undercapitalized" institution fails to submit or implement its capital restoration plan.[55] In addition, the regulators are required to favor the first three specified actions (restricting share distributions, restricting transactions with affiliates and restricting interest rates).[56] Various other restrictions, such as executive compensation limits, are also imposed.

In the case of an institution that becomes "critically undercapitalized," more severe activity restrictions automatically apply. The institution must, for example, refrain from making payments on subordinated debt,[57] engaging in unusual business transactions, highly leveraged financing, or covered transactions with affiliates, or paying "excessive compensation or bonuses."[58]

Most importantly, critically undercapitalized institutions are liable to be placed in conservatorship or receivership within 90 days, unless their primary regulators *and* the FDIC agree that an alternative action would be more appropriate for the purposes of section 38.[59] Such an institution *must* be seized and placed in receivership if it remains critically undercapitalized on average during the calendar quarter beginning 270 days after first falling into that condition.[60] The general conservatorship and receivership powers and responsibilities of the federal banking agencies have also been extensively revised in order to make PCA more effective.[61]

First, critical undercapitalization has been added to the general discretionary grounds for appointment of a conservator or receiver, as has another capital condition referred to as "substantially insufficient capital."[62] Second, the appropriate federal banking regulators are allowed, after consultation with the relevant state banking authority, to appoint the FDIC as sole conservator or receiver if the institution concerned is critically or "substantially insufficiently" undercapitalized, or is undercapitalized and has no reasonable prospect of becoming adequately capitalized, has failed to submit a satisfactory capital restoration plan, or having submitted such a plan has failed to implement it satisfactorily *and* the federal agency determines that the appointment is necessary to carry out the purposes of section 38.[63] Third, the FDIC now has independent authority, after consultation with any other appropriate federal or state banking agency, to appoint itself sole conservator or receiver of any insured depository institution if it determines that grounds for the appointment of a conservator or receiver exist and the appointment is necessary to reduce the risk or amount of loss to the federal insurance funds.[64] Finally, the other federal banking agencies may not place an institution into conservatorship without first giving the FDIC the opportunity to appoint itself receiver for the institution.[65]

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[54] FDI Act §11(c)(5)(K), inserted by FDICIA §133(a).

[55] FDI Act §38(f)(1), (2).

[56] *Id.* §38(f)(3).

[57] *Id.* §38(h).

[58] *Id.* §38(i).

[59] *Id.* §38(h)(3)(A).

[60] *Id.* §38(h)(3)(C). The mandatory imposition of receivership after 270 days is subject to a very narrow exception, where the agency determines, with the concurrence of the FDIC, that other action is appropriate given the condition of the depository institution and the heads of both agencies certify that the institution is "viable and not expected to fail." *Id.* §38(h)(3)(C)(ii).

[61] *See also infra* text accompanying notes 79-80.

[62] FDI Act §11(c)(5)(L)(ii).

2. Enhanced Safety/Soundness ("S/S") Regulation

S/S standards. The second prong of the early resolution system created by FDICIA, adding a new section 39 to the FDI Act ("section 39"), is the requirement that the banking agencies promulgate "regulations" establishing general standards for safety and soundness.[66] Section 39 classifies the standards to be adopted into three categories: *operational and managerial controls*; *asset quality, earnings and stock valuation standards*; and *compensation standards.* The regulations identifying these standards must be in effect by December 1, 1993, and the agencies are still in the process of formulating the rules for their implementation.[67]

S/S restrictions. When the S/S standards have been implemented, failure by an institution to meet them will trigger the early intervention provisions of section 39. An institution that fails to meet the S/S standards will be required to submit to its primary regulator a plan indicating how it will correct the deficiency. If the institution fails to submit or implement a plan, the agency can impose a host of specific requirements and restrictions upon the institution, including a prohibition against growth, restrictions on the payment of interest rates on deposits, and the election of a new board of directors. If this stage is reached, section 39 expressly triggers most of the intervention powers contained in section 38.[68]

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[63] *Id.* §11(c)(9).

[64] *Id.* §11(c)(10).

[65] *Id.* §11(c)(11).

[66] FDICIA §132, adding a new section 39 to the FDI Act, 12 USC §1831p-1 (initially 1831s).

[67] *See* Office of the Comptroller of the Currency, Office of Thrift Supervision, Federal Deposit Insurance Corporation, Board of Governors of the Federal Reserve System, *Joint Advance Notice of Proposed Rulemaking: Standards for Safety and Soundness*, 57 Fed. Reg. 31,336 (July 15, 1992). The Fed has just made available its proposed rules and these are now awaiting publication in the Federal Register. Board of Governors of the Federal Reserve System, *Standards for Safety and Soundness: Notice of Proposed Rules* [Docket No. R-0766] (Apr. 19, 1993) [hereinafter referred to as "Fed, *Proposed Safety/Soundness Rules*"].

3. Examination, Accounting and Audit Requirements

The third, complementary prong of the early intervention system is directed at ensuring the flow to the regulators of more accurate data concerning the financial condition of the depository institutions under their control. Prompted primarily by a General Accounting Office report,[69] FDICIA provided for more frequent examinations,[70] annual reports to regulators of condition, internal control evaluations, and greater independence and comprehensiveness in auditing,[71] and the adoption of uniform principles of accounting, consistent with generally accepted accounting principles.[72]

4. Enforcement

Sections 38 and 39 are partly self-executing in that certain restrictions are automatically triggered once an institution falls over one of the tripwires identified under those sections. In many cases, however, the agencies are required to make determinations that would have to be enforced if an affected institution or individual were to refuse to comply. In the PCA context, for example, an institution might be directed to restrict "excessively risky" activities, or to dismiss a senior executive officer. In the S/S context, an institution might be ordered to divest itself of a subsidiary, or to elect a new board of directors.

Sections 38 and 39 can also be enforced under the provisions of section 8(i) of the FDI Act, under the terms of which the agency may apply to a federal district court for the enforcement of its directive or order.[73] The two sections are also careful to preserve the power of the banking agencies to take other authorized action in addition to that which they may take under those sections.[74] This raises the obvious possibility that an agency might have a *choice* between taking formal enforcement action under section 8, or taking PCA or S/S action under sections 38 or 39.[75] Indeed, there is an express linkage between sections 8 and 38 in the case of unsafe and unsound conditions or practices leading to less-than-satisfactory examination ratings.[76] Some commentators have even expressed the fear that the agencies might manipulate this option in order to maximize their leverage over the institutions under their supervision.[77]

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[68] *See* §39(e)(2) & (3).

[69] GAO, *Failed Banks: Accounting and Auditing Reforms Urgently Needed* (GAO/AFMD-91-43, Apr. 23, 1991).

[70] FDICIA §111, amending FDI Act §10, 12 USC §1820.

[71] FDICIA §112, adding new FDI Act §36, 12 USC §1831m.

[72] FDICIA §121, adding new FDI Act §37, 12 USC §1831n.

[73] *See* FDICIA §131(c)(2) (amending FDI Act §8(i)(1)). Initially, FDICIA also attempted to render an individual or institution subject to a PCA directive liable for civil penalties under section 8(i)(2), but a drafting error originally made the FDICIA Amendment unintelligible. *See* FDICIA §131(c)(2)(B) (purportedly amending FDI Act §8(i)(2)(A)(ii)). As to S/S enforcement, FDICIA originally made no express provision for judicial enforcement or civil money penalty liability under section 8(i) of the FDI Act. These errors were corrected in 1992, and section 8(i) was amended to provide for judicial enforcement (§8(1)(1)) and enforcement by way of civil money penalties (§8(i)(2)) of section 39. *See* the Housing and Community Development Act of 1992, §1603(d)(3) & (4).

Whatever the case, FDICIA has created an anomalous situation. Severe PCA or S/S action can now be taken by a banking agency in circumstances in which the agency would, prior to FDICIA, only have been able to act by employing the formal enforcement procedures of section 8. This PCA or S/S action may also be enforced through the same judicial enforcement mechanism (section 8(i)(1)) as is used to enforce formal enforcement orders that would be subject to the formal adjudication and administrative due process requirements and safeguards of section 8 and the Administrative Procedure Act.[78] In the case of PCA or S/S action, however, those administrative procedures and safeguards do not apply.

Conservatorship and receivership also offer potential enforcement options. PCA may (and in some cases must) be enforced in many situations by means of outright seizure. As has already been noted, the conservatorship and receivership provisions relating to banks have been extensively amended in order to ensure early seizure of institutions with weak capital.[79] But the appointment of a conservator or receiver can be also used as an enforcement device well before an institution has become critically undercapitalized: in the case of *any* undercapitalized institution the appropriate agency has the power to appoint a conservator or receiver if the institution has no reasonable prospect of becoming adequately capitalized or fails to comply with a capital directive or submit or materially implement a capital restoration plan.[80]

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[74] *See* FDI Act §§38(m), 39(g).

[75] The regulators are clearly aware of the difficulties posed by the interrelationship between their PCA powers and their formal enforcement powers. *See, e.g., Regulators Outline Incorporation of FDICIA into the Examination, Enforcement Process*, 3(2) Reg. Compliance Watch 2 (Jan. 18, 1993) (quoting a senior counsel in the resolutions section of the FDIC's legal division as stating that the regulators "are now struggling with developing a policy for issuing PCA directives within the context of their existing discretionary policy").

[76] *See supra* text accompanying notes 38-39.

[77] *See, e.g., FDICIA Well-Capitalized Banks May Be Exposed to Prompt Corrective Action Provisions*, 59 Bank. Rep. (BNA) 237 (Aug. 24, 1992); *Threat of Reclassification will be Used by Regulators; Curbing Unsafe Practices*, 2(27) Thrift Reg. 1 (July 13, 1992).

The director of the OCC's Enforcement and Compliance Division has confirmed that the safety/soundness reclassification power will be used against well and adequately capitalized institutions in order to subject them to the restrictions otherwise applicable only to lower-category institutions where the regulators deem this to be appropriate. *See Reclassification Under Prompt Corrective Action System May Be Coming, OCC Official Says*, 60 Banking Rep. (BNA) 527 (1993).

[78] 5 USC §§554-57.

[79] *See supra* text accompanying notes 59-65.

Here, too, anomalous situations might arise if the agencies are subject to procedural differences according to whether they choose the seizure option as opposed to the formal enforcement or the PCA-directive options. As will be discussed, the judicial protections applicable to appointment of conservators and receivers are not treated consistently by the statutory provisions governing each of the four banking agencies, nor are the procedures prescribed by statute as generous as the administrative and judicial protections available in the other enforcement situations.[81]

B. Fundamental Importance of Basic "Capital" Classifications

The entire PCA framework is keyed to the basic capital categories described above.[82] Each of the categories—well capitalized, adequately capitalized, undercapitalized, significantly undercapitalized, and critically undercapitalized—serves as a trigger for the use by the agencies of new coercive powers against, and the imposition of new operating restrictions on, insured depository institutions and their officers and directors.[83]

The capital classifications also serve to define the scope of certain other, non-PCA, restrictions or privileges. As has already been observed, only well capitalized institutions may receive brokered deposits, well capitalized institutions are subject to less frequent on-site examinations, and they enjoy broader insurance powers than their less capitalized counterparts.[84] Capital classifications serve as primary (though not exclusive) criteria for the FDIC's new risk-related insurance assessment system,[85] and the Fed's new regulation governing limitations on interbank liabilities is keyed to risk-based capital levels.[86] The new safety/soundness standards proposed by the Fed will link asset-growth restrictions to an institution's capital category,[87] and the four federal banking agencies' "basket loan" concept, designed to stimulate increased credit availability, will apply only to well and adequately capitalized institutions.[88] It is also likely that any future reforms relating to nationwide bank branching or new securities powers will be linked by Congress to the capital status of the institutions affected.[89] The determination by the appropriate federal banking agency of an insured depository institution's capital classification therefore has very broad implications, both positive and negative, for the institution concerned, as well as for its affiliates.

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[80] FDI Act §11(c)(5)(K). *See supra* text accompanying note 54.

[81] *See infra* text accompanying notes 211-219.

[82] *See supra* text accompanying notes 34-37.

[83] For recent criticism of Congress' excessive reliance on capital classifications, *see, e.g.*, Julius L. Loeser, *The FDIC Improvement Act Errs Badly in Placing So Much Emphasis on Capital*, Am. Banker, Apr. 5, 1993, at 4.

[84] *See supra* text accompanying notes 43-45.

[85] *See* FDIC, *Assessments*, 57 Fed. Reg. 45263 (Oct. 1, 1992). The difference in insurance premiums can be very substantial: for example, an "A"-rated, well capitalized bank currently pays only 23 basis points for its federal insurance, whereas a "C"-rated, undercapitalized institution pays 31 basis points. *See id.* at 45282, 12 CFR §327.13 (1993). *See also* FDIC, *Assessments*, *supra* note 2, at 17538 (Table 4). Even for a relatively small institution with, say, $100 million in insured deposits, the difference would mean extra premiums of $80,000 per annum.

The importance of the basic capital determination also has corresponding implications for the examination process of which it is the result. Until 1991, the banking agencies were perfectly entitled to take the capital condition of an institution or its composite MACRO or CAMEL rating into account when deciding to take either informal or formal enforcement action. But their power to do so was entirely discretionary, and it has long been the practice for examiners, regional supervisors, and even the Washington offices to engage in informal discussion, suasion, and negotiation with the institution concerned before resorting to more coercive, formal enforcement action. If the latter option was chosen, the agencies had (and still have) to observe the procedures of section 8, which make ample provision for formal hearings and judicial review in a U.S. court of appeals.[90] If, on the other hand, an agency chose to place an institution into conservatorship or receivership, its decision would be (and still is) subject to an *ex post* challenge in a U.S. district court.[91]

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[86] *See* Federal Deposit Insurance Corporation, *Differences in Capital and Accounting Standards Among the Federal Banking and Thrift Agencies: Report to Congressional Committees*, 58 Fed. Reg. 4996, 4997 (Jan. 19, 1993); Federal Reserve System, *Report to Congressional Committees Regarding Differences in Capital and Accounting Standards Among the Federal Banking and Thrift Agencies*, 58 Fed. Reg. 3019, 3020 (Jan. 7, 1993).

[87] *See* Fed, *Proposed Safety/Soundness Rules*, *supra* note 67, 12 CFR §263.301(d)(2) (using the failure of a bank to be well capitalized as one of the criteria for determining whether the bank is undergoing "extraordinary growth").

[88] Under the interagency policy statement jointly released by the four agencies, *infra* note 128, well run, well and adequately capitalized institutions are permitted to establish a "basket" of small business loans that will not be subject to the normal loan-documentation requirements.

[89] *See, e.g.*, the Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, S. 543 (as reported out of the U.S. Senate Committee on Banking, Housing and Urban Affairs, Rep. 102-167 (1991)), §§302 & 303 (conditioning permission for national and state banks to branch nationwide on the requirement that the banks be "adequately capitalized and adequately managed"); §715 (conditioning approval for bank holding companies to establish securities affiliates on adequate capitalization for the holding company and the requirement that each of the holding company's insured depository subsidiaries be well capitalized).

[90] *See supra* text accompanying notes 206-207.

[91] *See supra* text accompanying notes 212-214.

FDICIA, while it did not add to the regulators' potential arsenal of coercive powers (except, perhaps, in the case of preinsolvency seizures), changed dramatically the *environment* in which those powers must be exercised. In the first place, section 38 provides for the use of coercive powers against institutions and individuals *outside* of the procedural format created by section 8. Second, the regulators have been stripped of their discretion to use capital levels and safety/soundness ratings as merely *relevant factors* in their overall assessment of what enforcement or seizure action (if any) to take against troubled institutions. Instead, capital levels and S/S ratings have been transformed into *triggers* for mandatory action by the regulators. At the same time, capital levels have become *qualifying* determinants for the exercise by insured depository institutions of their corporate powers. In other words, FDICIA has intensified greatly the importance of capital levels and S/S ratings whilst simultaneously reducing (or even bypassing) the procedural protections available to troubled institutions and their directors and officers.

The changes wrought by FDICIA have rendered the traditional tone of informality surrounding the examination process inappropriate. Much more now turns on the decisions of examiners than ever before, and this transformation of the supervisory landscape has exposed the deficiency, from the point of view of banks and their directors and officers, of the current procedures for securing review of examiners' decisions.

III. Administrative and Judicial Review Under the Current PCA System

PCA involves a substantial range of agency actions and procedures. Depository institutions and individuals subject to PCA will not only be presented with various forms of agency intervention, ranging from mild coercion to substantial intrusion, but they will also become involved with a variety of procedures, ranging from the simple and informal to the complicated and fairly formal.

Section 38 contains little itself by way of procedural requirements. The only express procedural provisions are contained in sections 38(g) and 38(n). Section 38(g) provides for "notice and an opportunity for a hearing" before a banking agency determines that an insured institution is in an unsafe or unsound condition, while section 38(n) provides for an "administrative review of dismissal orders." In the latter case, an apparent concern for the constitutional rights of directors and senior executive officers prompted the Congress to provide for a limited administrative due process hearing before the relevant banking regulator whenever the latter orders a PCA dismissal of a director or senior executive officer. As far as other PCA actions are concerned, Congress left it to the banking agencies to formulate appropriate procedures through the rulemaking process, and the final rules do indeed contain a number of procedural protections that were adopted both on the agencies' own initiative and in partial response to the comments received during the rulemaking process.

Prompt corrective action must, however, be based upon the information the agencies are able to glean concerning the depository institutions under their supervision. It is therefore important to understand the rudiments of how this information is gathered if we are to assess the adequacy of the procedures adopted in implementation of the requirements of section 38, and this aspect of the agencies' supervisory process will be addressed first in the ensuing discussion.

As to judicial review, earlier versions of the legislation did make general provision for review in the court of appeals of any actions taken under the prompt corrective action provisions.[92] Various more restrictive alternatives were explored in staff drafts in the Senate Committee on Banking, Housing and Urban Affairs (which formulated the PCA provisions as they appear in FDICIA). All reference to judicial review was, however, removed from the Committee Print that went to markup in the Senate Committee. The provision was reinserted in the version that passed the Senate, but was eventually dropped by the Senate conferees in the face of objections by House staff who believed that PCA determinations would not be reviewable under present law in any event.[93] Except insofar as enforcement is concerned,[94] no reference to judicial review remains in the final version of FDICIA. The result is that the default provisions of the Administrative Procedure Act ("APA") relating to judicial review will apply.

A. The Monitoring Process

The federal banking agencies obtain the information concerning the condition and activities of the institutions under their supervision in two primary ways. First, the institutions are required regularly to file various reports with their primary regulator; and second, the institutions are subject to regular and special on-site examinations by the agencies' examiners.

1. Monitoring

The most important reports that must be filed by a depository institution are reports of condition ("call reports"), reports of income, and, since the enactment of FDICIA, annual reports of condition and management.[95] Reports of condition and income must be filed at the request of the appropriate agency[96] and at least four times a year.[97] In practice, commercial banks file reports ("quarterly reports") every quarter (with the Fed, FDIC or OCC), savings associations ("thrift financial reports") every month (with the OTS), and bank holding companies (with the Fed) every quarter.[98] The information from these reports is computer-monitored on a continuing basis, and where the analysis of the information indicates cause for concern, the agency may decide to seek more information or conduct a special on-site examination or visitation.[99]

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[92] *See, e.g.*, S. 713, §35(j) (the bill sponsored by the Treasury).

[93] *See* Carnell, *supra* note 10, at 349; Carnell, *Prompt Corrective Action under the FDIC Improvement Act of 1991*, in Practising Law Institute, LITIGATING FOR AND AGAINST THE FDIC AND THE RTC 1992 27, 74 (1992).

[94] FDI Act §8(i)(1), 12 USC §1818(i)(1).

2. Examinations

On-site examinations are the most important of all the information-gathering processes employed by the agencies. Each federal banking agency has clear authority to conduct on-site examinations as deemed necessary.[100] The Federal Financial Institutions Examination Council has devised a uniform rating system (UFIRS) that has been adopted by all four federal regulators.[101] The system distinguishes between two types of ratings: one for each so-called "*key performance dimension*" of the institution under examination, and a separate "*composite rating*" that attempts to make a global assessment of the institution's condition and performance. The key performance dimensions are capital adequacy ("C"), asset quality ("A"), management ("M"), earnings ("E"), and liquidity ("L"),[102] and they are commonly referred to by the acronym

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[95] FDI Act §36, 12 USC §1831m, added by FDICIA §112 and effective with respect to fiscal years beginning after December 31, 1992.

[96] *See* Revised Statutes §5211, 12 USC §161 (national banks), Federal Reserve Act §9[6], 12 USC §324 (state member banks), FDI Act §7(a)(1), 12 USC §1817(a)(1) (federally insured state nonmember banks), and Home Owners' Loan Act §5(v), 12 USC §1464(v) (thrifts).

[97] FDI Act §7(a)(3), 12 USC §1817(a)(3).

[98] *See generally* Joseph P. Daly, *Enforcement Process*, in BANKS AND THRIFTS: GOVERNMENT ENFORCEMENT AND RECEIVERSHIP 4-1 at 4-42 - 4-43 (Barry Stuart Zisman ed. 1992) [hereinafter referred to as "Zisman"]. The FDIC has full access to these reports and is authorized to require, by agreement with the other relevant agency, additional reports when these are needed for insurance purposes. FDI Act §7(a)(2).

[99] *See* Daly, in Zisman, *supra* note 98, at 4-43.

[100] *See, e.g.*, Revised Statutes §5240, 12 USC §481 (OCC, for national banks); Federal Reserve Act §11, 12 USC §248(a) (Fed, for state member banks); FDI Act §10(b), 12 USC §1820(b) (FDIC, for all federally-insured state nonmember banks, banks filing applications for deposit insurance, insured depository institutions in default, and any other insured depository institution where the FDIC Board deems a special examination to be necessary); Home Owners' Loan Act §5(d)(1)(B), §1464(d)(1)(B) (OTS, for all federally-insured thrifts). *See generally, e.g.*, Daly, in Zisman, *supra* note 98, at 4-8 - 4-10.

[101] Uniform Financial Institutions Rating System, Policy Statement (Nov. 26, 1979).

[102] Examiners and reviewers are not precluded from considering other factors if, in their judgment, these other factors are relevant to an accurate assessment of the overall condition and soundness of a particular bank. *See* FDIC Division of Bank Supervision, Manual of Examination Policies 1.1-2 (1992) [hereinafter referred to as "FDIC Manual").

"CAMEL"[103] (or, in the case of institutions supervised by the OTS, "MACRO").[104] A scale of "1" to "5" is used to express the evaluation for both the key performance dimensions and the composite rating, where "1" indicates the highest evaluation and least degree of supervisory concern and "5" indicates the lowest rating and greatest degree of concern.[105] The composite rating, while it should normally bear a fairly close relationship to the rankings of the individual CAMEL components, is not derived merely by computing an arithmetic average of those individual rankings. It is "quite conceivable," for example, for an institution that has a "1" rating for capital adequacy, management, earnings and liquidity to have an "excessive volume of adversely classified assets," therefore meriting an overall composite rating of "3" as an indication that a "remedial program to address these asset weaknesses" should be incorporated into informal supervisory action against the institution.[106]

The level of intensity of the examination conducted by the agency's examiner will vary according to the result of a risk analysis of the institution performed prior to the examination and based on information from previous examinations and other sources. For example, the FDIC distinguishes among Tier I, II and III examinations. Tier I examinations are used "to ascertain the extent of problems that pose more than a normal risk to the deposit insurance funds"[107] and are conducted for deteriorating 3-rated as well as 4- and 5-rated institutions. A Tier I examination is much more thorough as far as the number of assets reviewed and the depth of analysis is concerned. Tier II examinations are somewhat less detailed and are used to determine "*whether* an institution poses more than a normal risk to insurance funds."[108] Tier II examinations are conducted in the case of all 1- and 2-rated institutions and "should be seriously considered for stable and improving 3-rated institutions."[109] These examinations are less detailed: for example, the volume of loans reviewed in a Tier II examination "can be dramatically reduced from the Tier I level" and should normally not exceed 25 percent of the dollar volume of loans.[110] Tier III examinations are used for all institutions, whatever their rating, to: "(a) confirm existing UFIR and [monitoring system] ratings; (b) determine if an institution's risk profile has changed and whether such changes will pose an undue insurance risk...; (c) determine progress in correcting previously noted deficiencies or monitor compliance with corrective programs and orders; and (d) evaluate other trends and situations."[111] Tier III examinations focus primarily on making an overall assessment of an institution's condition in order to keep the Division of Supervision informed of changes and trends that might jeopardize the insurance funds.[112] They are highly flexible, small-scale examinations that tend to focus on the adequacy of the institution's policies and procedures, using, for example, only small samples of assets.[113]

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[103] *See generally, e.g., id.* Part 1; Daly, in Zisman, *supra* note 98, at 4-13 - 4-23.

[104] The MACRO acronym stands for management, asset quality, capital adequacy, risk management, and operating results. *See generally* Daly, in Zisman, *supra* note 98, 4-24 - 4-31.

[105] The performance ratings are described as follows:

Rating "1"—Indicates strong performance, significantly higher than average.

Rating "2"—Reflects satisfactory performance which is average or above; this includes performance that adequately provides for the safe and sound operation of the bank.

Rating "3"—Represents performance that is flawed to some degree and as such is considered fair. It is neither satisfactory nor unsatisfactory but is characterized by performance that is [average] or below-average quality.

Rating "4"—Refers to marginal performance, significantly below average. If left unchecked, such performance might evolve into weaknesses or conditions that could threaten the viability of the institution.

Rating "5"—Considered unsatisfactory; performance that is critically deficient and in need of immediate remedial attention. Such performance, by itself or in combination with other weaknesses, threatens the viability of the institution.

FDIC Manual, *supra* note 102, at 1.1-1.

[106] *Id.* at 1.1-2.

[107] *Id.* at 1.1-9.

[108] *Id.* at 1.1-10.

At the conclusion of the examination the examiner compiles a report containing comments and conclusions together with a detailed statement of the financial condition of the institution, a detailed analysis of the examiner's treatment of the institution's performance dimensions, and the institution's composite rating.[114] Although shared with the bank itself, the examiner's report is considered highly confidential and is exempt from disclosure under the Freedom of Information Act.[115] The comments and conclusions are the most important aspect of the report, and examiners are encouraged to give time and thought to its formulation.[116] It is directed first and foremost at the institution's board of directors, although it is also intended to inform the examiner's regional supervisor and, ultimately, the Washington office. Before finalizing the report, the examiner will meet with the institution's management in an "exit interview," where problems highlighted in a "pencil draft" of the report will be reviewed. The meeting is an extremely important aspect of the continuing relationship between the institution and the examiner.[117] Ideally, the institution's management will undertake to make corrections as a result of the discussion that has transpired with the examiner, but the examiner may also be persuaded that a particular assessment, for example a loan classification, is wrong and should be upgraded. At the conclusion of the interview the examiner finalizes the report and appends certain confidential schedules for disclosure to the agency alone. The confidential portion of the report discloses factual information supporting the rating assigned to the management and, if appropriate, may recommend supervisory action.[118] The examiner's report is then reviewed in the regional office before a Report of Examination is formally issued to the institution with a request for a response to the report's conclusions and any corrective action that is required.[119] If the institution refuses to comply with any request for corrective action, it is possible that the agency may take further informal or formal enforcement action.[120]

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[109] *Id.*

[110] *Id.* at 1.1-12.

[111] *Id.* at 1.1-10.

[112] *Id.* at 1.1-13.

[113] *Id.* at 1.1-14.

[114] The examiner's individual performance dimension ratings are not disclosed to the institution. *See* Daly, in Zisman, *supra* note 98, at 4-39 n. 2.

[115] *See* 12 USC §552(b)(8).

[116] *See, e.g.*, FDIC Manual, *supra* note 102, at 1.1-15.

[117] On the importance of the ongoing relationship with the examiner, *see, e.g.*, Ralph A. Mock, *Informal Enforcement Process*, in Zisman, *supra* note 98, 8-1 at 8-16 - 8-18.

3. Review of Examinations

What opportunities do institutions have to appeal against adverse aspects of the Report of Examination? This is an important issue because the results of the examination directly affect the capital and supervisory status of an institution. Under current practice, the four banking regulators each permit an institution to seek review by a superior officer of their examiners' decisions.[121] In addition, the Competitive Equality Banking Act of 1987[122] ("CEBA") imposed upon the Federal Home Loan Bank Board (now the OTS) a requirement that institutions could secure review by the agency's principal supervisory agents (PSAs) of the decision of examiners or supervisory agents relating to the appraisal value of loans and collateral, loan classifications, and loan write-downs.[123] Under this provision, the PSA must take into account the report of an independent arbiter or panel of arbiters before approving, modifying or setting aside the decision under review.[124] The procedures currently available for review of examinations are represented by the following chart.

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[118] *See, e.g.*, FDIC Manual, *supra* note 102, at 10.1-29.

[119] *See, e.g.*, Daly, in Zisman, *supra* note 98, at 4-41.

[120] On subsequent informal and formal enforcement action, *see, e.g.*, Zisman, *supra* note 98, chs. 8 and 9.

[121] *See* Board of Governors of the Federal Reserve System, *Examinations and Inspections - Resolving Differences Between Bankers and Examiners*, FRRS 3-1532 (Trans. 138, 8/92); Federal Deposit Insurance Corporation, *Procedures for Requesting Review of Supervisory Decisions*, FIL-11-92 (Feb. 7, 1992); Comptroller of the Currency, *Examination Review Process*, PPM-5000-28 (rev) (Feb. 26, 1992); Office of Thrift Supervision, *Supervisory Review Process* (Apr. 6, 1992).

[122] Pub. L. No. 100-86, 101 Stat. 617.

[123] *Id.* §407(d), 12 USC §1442a.

[124] 12 USC §1442a(b). Independent arbiters are appointed under the provisions of subsection (c).

Chart 1: Current Examination Review Processes

	OCC	**FDIC**	**OTS**	**OTS** **12 USC §1442a**	**FED**
Subject matter reviewable	- examination findings and supervisory decisions - not enforcement actions	- "significant supervisory decisions" (including classifications, exam findings)	- final supervisory findings & decisions - not enforcement actions - not OTS policies	- appraisal value of loans & collateral - classification of loans - reserve requirements	- significant errors in examinations and related to safety/soundness, operation, management or financial standing of inst'n, or having a material impact on the regulator's supervision of the institution

	OCC	**FDIC**	**OTS**	**OTS 12 USC §1442a**	**FED**
Appeal to	*Community banks:* - field manager → overall supervisory office → district administrator → or district deputy comptroller *Regional banks:* - supervisory office or overall supervisor → district administrator or district deputy comptroller *Multinationals:* - deputy comptroller for multinational banking, D.C. *For all cases:* - alternative review directly to Office of Chief National Bank Examiner	→ Division of Supervision (DOS) Regional Office → DOS Director, D.C.	→ OTS, D.C. (Deputy Director, Regional Operations)	→ principal supervisory agent (PSA)	→ senior Reserve Bank officials; or → Reserve Bank President - "[t]hese officials have the discretion to decide whether the circumstances of the particular situation, including the views of the bank involved, suggest that the matter should be resolved by individuals who did not participate directly in the particular decision or examination finding under review...in these situations, while the examiner might be consulted, the examiner would generally not be involved in making the final determination" -Reserve Bank president or designee can also decide whether to resolve the issue in a manner that is confidential from the examiner involved
Power on appeal	OCC-D.C. can override	FDIC/D.C. can override ("will resolve or recommend a resolution of the issues")	OTS/D.C. can override	PSA must -take into account report by independent arbiter(s) -"approve, modify, or set aside on the basis of supervisory agent's review of all the facts and the regulations applicable"	Reserve Bank president can override examiners

	OCC	**FDIC**	**OTS**	**OTS 12 USC §1442a**	**FED**
Procedures	in writing (no detailed limits)	- must be requested with the knowledge of the institution's board - written submission describing details of the dispute - consultation between DOS Director (or designee) and lower staff	- S&L board must resolve to request review - five pages of written information (plus relevant excerpts from exam reports, etc.)	- provision for report by independent arbiter(s) - balance to be established by agency: RB4	- should be authorized by the state member bank's board of directors - "request for review" (no indication of whether this must be in writing)
Time limits	within a "reasonable time"	"timely" submission	within 30 days of receipt of document transmitting regional office's final determination	25-day arbiter review 20-day PSA review	within a "reasonable time"
Creates rights?	? (probably not)	No (review also discretionary	No	No	No

None of these procedures, however, create any further rights or administrative or judicial review. Indeed, they expressly foreclose such a possibility.[125] The appeal provisions just described have been criticized for failing to provide genuine, independent review of the examiner's determinations and for leading, it is claimed, to retributive action on the part of examiners in subsequent examinations.[126] The absence of any meaningful forms of appeal was strongly protested in a joint letter to the President-elect signed by the leading industry associations.[127] The President and the agencies responded by announcing that the agencies will devise new appeals and complaints processes.[128] The agencies are currently in the process of formulating these new processes.[129] At the OCC it appears that the appeals process will include bank access to a senior official who reports directly to the Comptroller.[130]

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[125] *See e.g.*, i.e. §1442a(f)(2) & (3); OTS Supervisory Review Process ("this review process is discretionary and does not confer any legal rights").

[126] *See e.g.*, Fred R. Bleakley, "Regulators from Hell: Frighten Some Banks But Also Win Praise, Wall St. J. Apr. 27, 1993, A1 at A14 (reporting the fear by some bankers and analysts that "retribution will follow any complaint about regulators"). *See also infra* text accompanying note 253..

[127] Letter from the American Bankers Association, Independent Bankers Association of America, Association of Reserve City Bankers, Association of Bank Holding Companies, Consumer Bankers Association, and Savings & Community Bankers of America, to the President-elect, Bill Clinton, dated Dec. 7, 1992. On pages 1-2 of the accompanying recommendations, the organizations urged the President-elect to "restore due process " by creating an appeals process against examination results that "are used to levy significant money penalties or enforcement actions against officers and directors, even for technical infractions such as inadvertent addition errors on regulatory report."

B. Administrative Review of PCA Determinations

The procedures directly applicable to PCA determinations are governed both by statute and by formal agency regulations. The following discussion and charts summarize those presently applicable.

1. Capital Classifications

As far as PCA is concerned, there are no additional statutory procedural requirements in the case of a classification based on the capital condition of the institution concerned.[131] The agencies have also not provided any procedural additions in their Final Rules, although their joint discussion of the Final Rules indicates that the agencies do contemplate some kind of informal opportunity for an explanation of information adverse to the institution.[132] As a result, the procedures already described provide the basis for the initial and any reclassifications that might follow. The situation currently applicable is represent represented by chart 2.

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[128] *See* Remarks by the President on Policy to Alleviate the Credit Crunch, at 3 (Office of the Press Secretary Mar. 10, 1993); Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve Board, Office of Thrift Supervision, Interagency Policy Statement on Credit Availability, at 4 (Mar. 10, 1993). In their joint release, the agencies state that each agency will "take appropriate steps to ensure that its appeals process is fair and effective. In particular, each agency will ensure that its process provides a fair and speedy review of examination complaints and that there is no retribution against either the bank of the examiner as a result of an appeal." *Id.*

[129] Letter from the Deputy Chief Counsel, OCC, to the author, dated Apr. 9, 1993.

[130] *See Acting Comptroller Steinbrink Fills in Some Gaps of Clinton Credit Crunch Plan*, 60 Banking Rep. (BNA) 367 (1993).

[131] Notice-and-hearing procedure is required where an institution is reclassified as a result of noncapital considerations. *See* further *infra* text accompanying notes 137-140, and Chart 3.

[132] *See* the joint discussion of the Final Rules, *supra* note 11, at 44574.

Chart 2: Capital-Based Capital Classification Procedure

Basis for Calculation	*Agency Procedure*	*Moment of Implementation*
1) Self-monitoring by institution	Institution must supply information w/in 15 days of any material event that would cause the institution to be assigned to a lower capital category *[§325.102(c)(1)]* Institution can also seek reclassification to a higher category *[Comment 44.874 (Final Rules)]* Agency review of information supplied by management, together with any explanations, to determine whether adjustment is appropriate, and notification of determination *[§325.102(c)(2)]*	Institution deemed to have been notified of new capital category on most recent date of: - call report due; - final report of examination filed to bank; or - date of notice by FDIC under §325.102(c) or §325.103(d) *[§325.102(b)]*
2) Call Reports	Agency analysis of data	Deemed notified of capital levels and capital category at date that call report is required to be filed (or date of final report of examination, or notification of change under §325.103(d), if more recent *[§325.102(b)(1)]*
3) Information obtained in examination or inspection	Examination process Informal statutory review process applicable to OTS *[12 U.S.C. §1442a]* Informal internal appeal process or supp. review [*See chart 1 above*] Agency analysis of data	Date of delivery of final examination report *[§325.102(b)(2)]*
4) "Other information obtained by the agency from any source," including - data provided by the institution on a voluntary basis, - information obtained in connection with an application, - calculations based on reports other than Call reports, or - "adjustments that are appropriate based on publicly announced events that may affect an institution's capital" *[Comment 57 Fed. Reg. 29.668 (FDIC Proposed Rules)]*	Agency notifies institution in writing of the calculation and the information used as a basis for the calculation (*Unclear whether §325.102(c) applies)*	Date of provision of written notice by FDIC that institution's capital category has changed *[§325.102(b)(3)]*

2. Reclassifications Based on Noncapital Considerations

Section 38(g) provides for the reclassification of an institution's capital category on a basis other than its capital condition. Being concerned that "factors other than capital should in certain circumstances be used to assess the financial condition of an institution,"[133] Congress authorized the agencies, regardless of an institution's actual capital status, to downgrade the institution's classification from well capitalized to adequately capitalized, adequately capitalized to undercapitalized, or undercapitalized to significantly undercapitalized, where (a) the agency has determined, "after notice and an opportunity for hearing," that the institution is in an unsafe or unsound condition, or (b) the agency has deemed the institution to be engaging in an unsafe or unsound practice because the institution has received a less-than-satisfactory rating for asset quality, management, earnings, or liquidity.[134] In practice, a less-than-satisfactory rating would occur wherever the institution receives a rating of "3" or lower for one of its noncapital key performance dimensions.[135] Once again, therefore, the examination process is very important for the PCA capital classification of an institution.[136]

As far as a reclassification based on unsafe or unsound *condition* is concerned, the statute requires the agencies to provide "notice and an opportunity for a hearing," but the statute is silent as far as procedural requirements for a reclassification based on unsafe or unsound *practice* are concerned. In their proposed rules, the agencies interpreted this silence as not requiring any procedural protection for the institution, but in response to adverse comments they revised their position and adopted the same notice-and-hearing requirements for both forms of classification.[137] They did, however, reject comments calling for the adoption of a formal adjudicatory process. Relying on judicial decisions that have interpreted the triggering requirements for formal, on-the-record adjudication under the APA very strictly,[138] the agencies concluded that a less formal notice-and-hearing requirement would be sufficient, particularly given the fact that the reclassification will follow upon an examination process that "involves substantial participation by the affected institution."[139] The procedure that has been adopted permits written submissions and oral argument, but only allows the introduction of oral evidence if the FDIC or presiding officer expressly so authorizes.[140] The overall process is represented by chart. 3

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[133] Joint agency discussion of Final Rules, *supra* note 11, at 44876.

[134] *See supra* text accompanying notes 38-40.

[135] On key performance dimensions and their ratings, *see supra* text accompanying notes 102-105.

[136] As the agencies observe in their joint discussion of the Final Rules, "[t]he examination rating...serves as the trigger for reclassification." *Id.* at 44877.

[137] See their discussion on the final rules, *supra* note 11, at 44876-77.

[138] The cases cited by the agencies are United States v. Florida East Coast Ry., 410 U.S. 224, 240 (1973) and Independent U.S. Tanker Owners Committee v. Lewis, 690 F.2d 908, 922 n. 63 (D.C. Cir. 1982).

[139] Joint discussion of the final rules, *supra* note 11, at 44877.

Chart 3: Reclassifications Based on Non-Capital Considerations

Basis for Reclassification	*Procedures*
1) Unsafe and unsound condition *[FDI Act §38(g)(1); 12 CFR §325.103(d)(1)]*	PCA Procedures Notice and informal oral hearing; no formal adjudication *[12 CFR §308.202(a)(2)* - notice *(3)* - bank's response (within 14 days, unless FDIC determines shorter period appropriate (*(2)(iii);* contents) *(4)* - failure to file response *(5)* - request for hearing & presentation or oral testimony or witnesses (must be made; no right to present oral testimony) *(6)* - order for informal hearing (w/in 30 days) *(7)* - hearing procedures, oral argument and written submissions (usually w/in five days) *(8)* - recommendation of presiding officers (w/in 20 days) *(9)* - time for decision (w/in 60 days)]
	General Enforcement Procedures Formal adjudication procedures and sanctions under FDI Act §8 *[12 U.S.C. §1818 & regs]*
2) Unsafe & unsound practice resulting in less-than-satisfactory CAMEL or MACRO rating *[FDI Act §38(g)(1), read with new FDI Act §8(b)(8); 12 CFR §325.103(d)(2)]*	Initial examination process leading to rating Notice and informal hearing as in 1) above, no formal adjudication
Applicable to both Request for rescission of reclassification *[12 CFR §308.202(b)]*	

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[140] *See, e.g.*, 12 CFR §308.202(a)(7) (1993) (FDIC).

3. Capital Restoration Plans

Once an institution is classified as less than adequately capitalized, it must, where the classification was based on the capital condition of the institution,[141] develop and implement a capital restoration plan that is acceptable to its federal regulator.[142] The agency may enforce this requirement by means of appropriate backup PCA directives[143] and, ultimately, by seizing the institution.[144]

Although the statute provides no procedures for the submission and approval or rejection of a capital restoration plan, the agencies have developed procedures that are now in their Final Rules. These provide for an informal "paper hearing."

Chart 4: Capital Restoration Plans

Institution	*Procedures*
1) Institutions that are - undercapitalized -significantly undercapitalized - critically undercapitalized	Written plan required to be filed for review and approval/disapproval by agency *[12 CFR §325.104(a)(1)* -written capital restoration plan to be filed w/in 45 days of notice or deeming (not including reclassified inst'ns) *(a)(2)* - additional or revised plan only required when FDIC notifies bank that new/revised plan is required *(b)* - contents of plan *(c)* - review by agency w/in 60 days (can extend the time) *(d)* - disapproval of plan; new plan must be submitted w/in time specified by agency *(e)* - failure to submit plan (falls into "significantly undercapitalized" net) *(f)* - failure to implement plan (falls into same net) *(g)* - amendment of plan permitted after prior written notice to and approval by agency*]*
2) Controlling institutions	Plan cannot be approved unless controlling company provides a guarantee of performance; approval on case-by-case basis *[12 CFR §325.104(h)* *(h)(1)(i)* - limitation on amount of guarantee *(h)(1)(ii)* - limitation on duration *(h)(1)(iii)* - collection on guarantee *(h)(2)* - failure to provide guarantee *(h)(3)* - failure to perform guarantee*]*
3) Reclassified institutions (unsafe/unsound condition or practice)	Description of steps to be taken to address deficiencies *[FDI Act §38(g)]* No requirement to submit capital plan, unless agency decides (case-by-case)

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[141] Obviously an institution that was reclassified on the basis of noncapital considerations would not be subject to this requirement. Instead, it would be subjected to an appropriate PCA directive or be required to correct the condition or practice that led to the reclassification. *Cf.* also FDI Act §39(e)(1), 12 USC §1831p-1(e)(1) (requiring the submission of a plan for correcting deficiencies in compliance with applicable safety/soundness standards).

[142] FDI Act §38(e)(2).

[143] *See* FDI Act §38(e)(5).

[144] FDI Act §11(c)(5)(K). *See supra* text accompanying note 54.

4. PCA Directives

No procedures are prescribed by the statute in the case of directives issued under section 38(f).[145] The agencies have, however, developed informal notice-and-hearing procedures in their Final Rules. In addition, the FDIC has specifically delegated the power to issue and modify these directives to its deputy regional directors[146] and has subjected the directive process to its regulation providing for reconsideration of decisions by the deputy regional directors.[147] The procedures that are available to institutions subject to PCA directives may therefore be represented as follows:

Chart 5: PCA Directives

<table>
<tr><th>Form of Directive</th><th>Procedure</th></tr>
<tr><td>1) Action on written notice</td><td>Written notice
Informal "written" hearing; no oral hearing
[12 CFR §308.201(a)(1)
- written notice by FDIC
(b) - contents of notice & date for response
(c) - timing & content of response (w/in 14 days, unless agency extends)
(d) - FDIC consideration of response & determination
(e) - failure to file response]</td></tr>
<tr><td>2) Summary action</td><td>Immediate directive & written "appeal"
[12 CFR §308.201(a)(2)
- immediate action, if found to be necessary by FDIC
- submission of written appeal w/in 14 days, unless FDIC allows longer period
- FDIC determination w/in 60 days
- directive remains in effect during this period unless FDIC stays]</td></tr>
<tr><td>3) Action by consent</td><td>Agency not required to follow any of the above procedures or time limits</td></tr>
<tr><td colspan="2">Applicable to all
Request for rescission or modification
[12 CFR §308.201(f)]
Applicable to FDIC-regulated institutions
Request for reconsideration under 12 CFR §308.6(e)
[See 58 Fed.Reg. 8213 (Feb. 12, 1993)]</td></tr>
</table>

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[145] On the circumstances in which a directive may be issued, *see supra* text accompanying notes 46-56.

[146] *See* FDIC, *Applications, Delegations of Authority, Capital Maintenance, Prompt Corrective Action*, 58 Fed. Reg. 8210, 8213 (Feb. 12, 1993).

[147] 12 CFR §303.6(e).

5. PCA Dismissals

As a practical matter, the banking agencies have been able in the past to cajole an institution into replacing its management as part of an agreement designed to restore the institution to a sound condition.[148] Since 1933 in the case of the Fed, with regard to national banks, and generally since 1966,[149] the federal banking agencies have also been able to institute formal enforcement proceedings in order to suspend and permanently remove bank and thrift directors, officers and other institution-affiliated parties from their positions.[150] They have been able to order suspension without advance notice;[151] if such enforcement action is taken, the respondents have an opportunity to seek a stay of an immediate suspension order in a U.S. district court.[152] In the case of a permanent removal order not based on indictment for a crime involving dishonesty,[153] the respondent has a right to an on-the-record agency adjudication[154] and subsequent judicial review in a U.S. court of appeals.[155]

Section 38, on the other hand, authorizes the federal banking agencies to order, as one of the PCA actions they might take against an institution classified as less than adequately capitalized, the dismissal of directors or senior executive officers who have held office with the institution for more than 180 days immediately before the institution became undercapitalized.[156] Such a removal is quite distinct from any enforcement removal by the agency under section 8 of the

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[148] This is the practical result of the agencies' extensive background enforcement powers. As the court in *Miami Beach Fed. Sav. & Loan Ass'n v. Callander*, 256 F.2d 410 (5th Cir. 1958), observed, if perhaps somewhat dubiously, the threat of more serious sanctions enables the regulator to order that the institution "clean house," and it would be difficult to hold that such a request would constitute an abuse of power by the agency. *Id.* at 414-15 (quoted with approval in United States v. Gaubert, 499 US 315, 333 (1991)).

[149] Financial Institutions Supervision Act, Pub. L. No. 89-695, 80 Stat. 1028 (1966).

[150] *See* FDI Act §8(e) & (g), 12 USC §1818(e) & (g).

[151] *See* FDI Act §8(e)(3) (permitting immediate suspension under certain circumstances).

[152] *Id.* §8(f). The constitutional sufficiency of this "post-dismissal" hearing is not clear: the Supreme Court has considered (and upheld) the constitutional adequacy of the post-dismissal hearing provided where a party has been removed by the agency, under §8(g), after having been indicted on a serious crime involving dishonesty. *See* Federal Deposit Insurance Corporation v. Mallen, 486 U.S. 230 (1988). But the strict constitutional requirements for summary action may be easier to satisfy when the predicate for the action is an independent, serious allegation of criminal wrongdoing than when it might only be based on noncriminal factors. *Cf. id.* at 240-41 (discussing the safeguards that accompany proceedings brought under §8(g)).

[153] Where the removal is based on such an indictment, the FDI Act provides for a less formal, post-removal hearing. *See id.* §8(g)(3), and *see infra* text accompanying notes 163-164.

[154] *Id.* §8(h)(1).

[155] *Id.* §8(h)(2).

[156] FDI Act §38(f)(2)(E)(ii). This action can be taken against any significantly undercapitalized institution and any undercapitalized institution that fails to submit and implement an acceptable capital restoration plan. In addition, the agency can require the employment of new senior executive officers approved by the agency. *Id.* §38(f)(2)(E)(iii).

FDI Act.[157] A PCA removal is subject to certain procedures stipulated in section 38(n), which permits the director or officer dismissed to obtain review of the decision to order his or her dismissal on written petition for reinstatement.[158] The statute requires the agency to provide the dismissee with a hearing at which he or she may submit written materials in support of the petition and may appear personally or through counsel before the agency, one or more of its members, or one of its designees. In their Final Rules, the agencies have interpreted these requirements as not including the right to introduce oral testimony and present witnesses without the permission of the hearing officer,[159] and, considering the submission of affidavits to be an effective substitute, they rejected the appeals by commenters that such presentation should be permitted.[160] The procedures now available are represented in Chart 6.

Chart 6: PCA Dismissals

Action	*Procedure*
Dismissal of director or senior executive officer *[FDI Act §38(n)]*	Summary dismissal, but informal post-dismissal hearing for reinstatement; no absolute right to oral hearing *[12 CFR §308.203(a)* - notice of dismissal (to institution & individual) §38(n)(1); §308.203(b) - right to petition for reinstatement (w/in 10 days) §308.203(b)(2) - individual must give reasons for requested reinstatement, request oral hearing & give notice of witnesses §38(n)(2); §308.203(c) - order for informal written & oral hearing & deadlines (30 days) §308.203(d) - hearing procedures (oral presentation & witnesses only with authorization of FDIC or presiding officer) §38(n)(3) §308.203(e) - standard for review & burden of proof (and cannot challenge capital classification) §308.203(f) - recommendation of presiding officer (w/in 20 days) §308.203(g) - final decision w/in 60 days & reasons if denied.*]*

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[157] *Id.* §38(f)(2)(E)(ii) ("Dismissal under this clause shall not be construed to be a removal under section 1818 of this title").

[158] *Id.* §38(n)(1).

[159] *See, e.g.*, 12 CFR §308.203(d) (FDIC).

[160] *See* their joint discussion of the Final Rules, *supra* note 11, at 44875.

Congress made provision for this limited notice-and-hearing procedure out of a concern that a PCA dismissal order might implicate a property interest protected by the due process clause of the Fifth Amendment.[161] Yet the hearing provided for is extremely limited, not so much because it is informal and does not provide the right to present witnesses and introduce oral testimony as of right, but because Congress has also stipulated a burden of proof that is almost impossible to discharge. The statute requires that the dismissee "shall bear the burden of proving that [his or her] continued employment would materially strengthen the insured depository institution's ability…to become adequately capitalized …[or] to correct the unsafe or unsound practice" that led to the downgrading of the institution in the first place.[162]

Given the fact that anyone who is subject to being dismissed under section 38 must have held office with the institution for at least 180 days before the institution was classified as undercapitalized, it is difficult to imagine how a dismissee would be able to discharge his or her burden of proof: when the causes of the institution's difficulties are so complicated that the agency is unable to find evidence sufficiently clear to bring a separate formal enforcement action against the individual, it is unlikely that the individual would be able affirmatively to prove that his or her continued employment would serve to improve the institution's condition. Such is likely to be a matter of pure speculation, and, absent very unusual circumstances, it is conceivable that no one in the institution (nor even the regulators themselves) would be able to discharge the burden of proof.

Perhaps more curiously, the congressional drafters appear to have adopted as their model the provisions of section 8(g)(3) of the FDI Act. This subsection governs hearings in cases where an institution-affiliated party is suspended or removed because he or she has been charged with a crime involving dishonesty or breach of trust, which is punishable by imprisonment for a term exceeding one year.[163] The hearing provided for under section 8(g)(3) is more restrictive than one that would be available in the case of other removal actions. This is perhaps not remarkable, since the individual concerned will already have received a full judicial trial on the underlying charge. Yet a similarly restricted hearing in the case of a PCA dismissal seems quite ironic: not only will the PCA dismissal be unconnected with any criminal charge, but the basis for the dismissal need not even be as serious as might constitute grounds for removal on other, less serious, grounds under section 8. In other words, in order to gain the full benefit of a formal, on-the-record agency hearing and judicial review in a court of appeals, one should not conduct oneself so reprehensibly as to attract serious criminal charges, but one should conduct oneself badly enough to attract formal removal proceedings! The limitations on the hearing requirements of section 38(n) are so substantial that at least one study has concluded that they are constitutionally inadequate.[164]

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[161] Here the author relies on his personal knowledge acquired while working for the staff of the Senate Banking Committee during the markup for S. 543 (the Senate vehicle for FDICIA). The Court in *Federal Deposit Insurance Corporation v. Mallen*, 486 U.S. 230 (1987) accepted that "it is undisputed that appellee's interest in the right to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause." *Id.* at 240.

[162] FDI Act §38(n)(3).

[163] *See* FDI Act §8(g)(1).

C. Possibilities for Judicial Review

Section 38 makes no express provision for judicial review of PCA determinations. The availability of judicial review is therefore uncertain. It is possible that judicial review has been precluded, either by the FDI Act itself or by operation of the APA. On the other hand, the FDI Act does provide various vehicles by which judicial review might be available, and the APA itself could provide for judicial review. Judicial review might also be mandated by the U.S. Constitution.[165] The following sections examine these various possibilities.

1. Possible Bases for Judicial Review

a. Full Judicial Review under APA §702

In the absence of any reference in section 38 to judicial review, the first possibility is that the default provision in section 702 of the APA will apply. Section 702 provides that, with the exception of actions involving money damages (in which case the Federal Tort Claims Act and Tucker Act apply), "[a] person suffering legal wrong because of agency inaction, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

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[164] *See* Howard N. Cayne & Michael Caglioti, *The FDICIA Dismissal Authority: What Process is Due?* (report for the Constitutional Rights Task Force, American Association of Bank Directors 1993). For official acknowledgment that the PCA dismissal provisions might be constitutionally deficient, *see Agencies May Face Due Process Claims, Depending on How Bankers Are Dismissed*, 60 Banking Rep. (BNA) 587 (1993) (reporting the remarks by the OCC's Director of Enforcement and Compliance).

Apart from the problem of the burden of proof, it might be that even if the procedure prescribed in §38(n) is constitutionally adequate on its face (cf. FDIC v. Mallen, 486 U.S. 230 (1988), upholding the procedure prescribed in §8(g)) it could be applied unconstitutionally where a hearing officer refuses to permit the presentation of oral witnesses and the introduction of oral evidence. *See id.* at 247 (suggesting that such a refusal in circumstances where "oral testimony is essential to enable the hearing officer to make a fair appraisal of the impact of a suspended officer's continued service on the bank's security and reputation" might constitute a denial of due process).

[165] A damages action based on the negligence of the regulator in implementing PCA, which might have presented a further avenue of review, is effectively precluded by the "discretionary function" exception of the Federal Tort Claims Act, 28 USC §2680(a). *See* United States v. Gaubert, 499 US 315 (1991).

If this default right-to-review provision does indeed apply, then the general standard of review would be governed by the APA §706, which would permit a reviewing court to set aside a PCA decision if it were "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[166] The "substantial evidence" provision of §706(2)(E) would probably not be available because the agencies are not required by section 38 (or section 39) to engage in formal adjudication on the record within the meaning of §§554-57 of the APA.[167] Although APA §706(2)(F) also contemplates the possibility of a trial de novo on the facts, this option will probably not be available because the agencies have developed procedures for PCA factfinding.[168]

b. Complete or Partial Preclusion of Review?

i. Implied Preclusion of Judicial Review under APA §701(a)(1)

It might be argued that the language, structure and history of section 38 indicate an intention on the part of Congress to preclude review altogether or in part. As far as the legislative history is concerned, there is evidence that Congress considered the possibility of full or partial judicial review and decided against making provision for it.[169] Section 38 makes no provision in its language for review, and the specific provision for judicial enforcement under the FDIC Act §8(i)(1) that FDICIA provided (§131(c)(2)) might be taken to suggest that Congress intended judicial enforcement to provide the only court involvement in the PCA process.

On the other hand, the Supreme Court has long emphasized a strong presumption in favor of reviewability.[170] Since the legislative history underlying section 38 is sparse, no other provision is made for judicial relief from action taken under section 38, and the cross reference to section 8(i)(1) in section 38 is made solely for enforcement purposes, the ambiguities surrounding the absence of any reference to judicial review in section 38 would probably be insufficient to overcome the presumption in favor of judicial review.

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[166] §706(2)(A).

[167] *See, e.g.*, United States v. Florida East Coast Ry., 410 U.S. 224 (1973); Independent U.S. Tanker Owners Committee v. Lewis, 690 F.2d 908, 922 n. 63 (D.C. Cir. 1982); United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519, 536 (D.C. Cir. 1978).

[168] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); but *see* the critical analysis of *Overton Park* by Deal, *Banking Law is Not for Sissies: Judicial Review and Capital Directives* 12 J.L. & COM. 185 (1993).

[169] *See supra* text accompanying notes 92-94.

[170] *See, e.g.*, McNary v. Haitian Refugee Center, 498 US 479, 496 (1991); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-73 (1986); Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

ii. Partial Preclusion of Judicial Review under APA §701(a)(2)

A more likely basis for concluding that there is no judicial review is to be found under the "committed to agency discretion" provision of APA §701(a)(2). This provision, which creates linguistic tension with the "abuse of discretion" language of §706(2)(A),[171] has been the subject of great judicial and scholarly controversy in recent years.[172] Its implication is that if a reviewing court were to regard a PCA classification, determination or directive as "committed to agency discretion by law," the PCA action would be unreviewable.

At the risk of some oversimplification, there are two broad strands of judicial doctrine addressing this narrow exception to review. The first holds that agency decisions are unreviewable when they are made under statutory mandates that are so broadly discretionary that there is "no law to apply"[173] and where strong policy arguments counsel against review.[174] In a matter closely related to the likely context of PCA actions, the Fifth Circuit in *Federal Deposit Insurance Corporation v. Bank of Coushatta*[175] held that the decision to issue a capital directive against a bank and its directors was a decision "committed to agency discretion by law" and therefore unreviewable.[176] In *Coushatta* the FDIC had issued a directive requiring a bank and its board to restore the bank's capital-to-assets ratio to a minimum level set by the agency, to further enhance the capital by at least $725,000, and to submit a plan within 30 days for achieving the required capital level. When the bank failed to comply, the FDIC filed an ex parte letter in a federal district court seeking enforcement of its directive under the FDI Act, against the bank and its board.[177] The court issued the requested order and the bank and its board appealed. On appeal, the Fifth Circuit emphasized the broad discretionary language of the governing statute[178] and concluded that, although the statute did not evince a sufficiently clear intention to overcome the presumption in favor of judicial review,[179] the decision to issue a directive was exempt from the judicial review provisions of the APA because it fell within the "committed to agency discretion" exception of the APA's section 701(a)(2).[180] The Sixth Circuit has more recently applied the *Coushatta* holding in a somewhat different context. In *United Liberty Life Insurance Company v. Ryan*,[181] an investor in a failed thrift brought suit seeking to hold the relevant banking agencies responsible for failing to enforce a net worth maintenance agreement entered into by the purchaser of the thrift at the behest of the FHLBB. The district court granted summary judgment in favor of the defendants and the court of appeals affirmed. The panel held, with respect to the failure to enforce the agreement, that the agencies enjoyed sovereign immunity to the extent of the "committed to agency discretion" exception of section 701(a)(2).[182] The statutory provisions under which the FHLBB and OTS might have acted[183] were, in the court's view, couched in highly discretionary terms.[184] In addition, the action complained of was an alleged *failure to enforce* which, as the Supreme Court has made clear, is almost always covered by the section 701(a)(2) exception.[185]

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[171] *See* Heckler v. Chaney, 470 U.S. 821, 829 (1985).

[172] *See generally, e.g.*, Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV 689 (1990).

[173] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). For a vigorous critique of the basis and reasoning of the "no law to apply" doctrine relied upon in *Overton Park*, *see* 5 K. C. Davis, Administrative Law Treatise 290-97, §28:8 (2 ed. 1984) [hereinafter "K.C. Davis, Treatise"] & Supp. 500-03, §§28:1-6, 28:1-7 (1989).

[174] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (refusing to review decision by agency not to take enforcement action because the decision involved a number of considerations peculiarly within the agency's expertise, including allocation of resources).

[175] 930 F.2d 1122 (5th Cir.), *cert. denied*, 112 S. Ct. 170 (1991).

[176] *See also* TransOhio Savings Bank v. Director, Office of Thrift Supervision, 1991 WL 201178, *4-*7 (D.D.C. 1991), *aff'd on other grounds*, 967 F.2d 598 (D.C. Cir. 1992). For extensive criticism of the *Coushatta* decision, *see* Deal, *supra* note 168; Thomas M.L. Metzger, *FDIC Capital Directive Procedures: The Unacceptable Risk of Bias*, 110 BANKING L.J. 237 (1993).

[177] For a description of this ex parte proceeding, *see* Deal, *supra* note 168, at 190. Mr. Deal represented the Bank of Coushatta in its appeal to the Fifth Circuit.

[178] 930 F.2d at 1125-26.

On the basis of the *Coushatta* decision (and presumably also the decision in *United Liberty Life*) some regulators have taken the view that PCA directives will not be reviewable.[186] On the other hand, the statutory authority under which the capital directive in *Coushatta* was issued (the International Lending Supervision Act ("ILSA") of 1983[187]) speaks in very general language about the goal of minimum capital adequacy that was the subject of the directive.[188] Section 38 and its implementing regulations, by contrast, contain considerable detail concerning the capital measures, classification processes and PCA options that must be pursued against banks. It may be that a court considering action under section 38 would conclude that there was "sufficient law to apply."[189]

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[179] *Id.* at 1128.

[180] *Id.* at 1129.

[181] 985 F.2d 1320 (6th Cir. 1993).

[182] *Id.* at 1325-27.

[183] I.e., 12 USC §§1464(s)(1)(B) (authorizing the agencies to impose capital requirements); 1818(i)(1) (authorizing the agencies to seek enforcement of capital directives in federal district court); and 1464a(g)(5)(B) (authorizing the agencies to seek judicial enforcement against savings and loan holding companies).

[184] *See* 985 F.2d at 1326-27.

[185] Heckler v. Chaney, 470 U.S. 821 (1985), applied by the Sixth Circuit in *United Liberty Life*, 985 F.2d at 1326.

[186] *See, e.g., FDIC Official Gives Bankers a Glimpse of Final Prompt Corrective Action Rules*, 58 Bank. Rep. (BNA) 763 (1992).

[187] Pub. L. No. 98-181, §908, 97 Stat. 1280 (codified at 12 USC §3907).

[188] *See* 12 USC §3907, which states in relevant parts:

> (a) (1) Each appropriate Federal banking agency shall cause banking institutions to achieve and maintain adequate capital by establishing minimum levels of capital for such banking institutions and by using such other methods as the...agency deems appropriate.
>
> (2) Each...agency shall have the authority to establish such minimum level of capital for a banking institution as the...agency, in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution.

As can be seen from the charts in Part III(B) above, the range and variety of PCA actions, and the factual premises upon which they must be based, are considerable. If the first, "no law to apply" doctrinal strand prevails, a reviewing court could well take the position that it is only the most intensely discretionary aspects of the PCA determination process that are immune from review, and that errors regarding factual determinations, for example, are fully within the court's reviewing power.

iii. Full Preclusion of Review under APA §701(a)(2)

The second strand of doctrine relating to the "committed to agency discretion by law" exception focuses on the "by law" facet of §701(a)(2). In his partial dissent in *Webster v. Doe*,[190] Justice Scalia articulated a view of the exception to review that could well preclude *all* judicial review of PCA decisions and directives. Justice Scalia argued that the "no law to apply" criterion was unworkable because there is almost always *some* law to apply (as is clearly the case in the PCA context). Instead, he opined, it is not only statutory "law" that the courts must consider; it is also the common law tradition of unreviewability, since §701(a)(2) "operates to keep certain categories of agency action *out of* the courts."[191]

If the Scalia view were to gain acceptance, it is possible that a court might conclude that all PCA determinations and actions are unreviewable, although it

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(b) (1) Failure of a banking institution to maintain capital at or above its minimum level…may be deemed by the…agency, in its discretion, to constitute an unsafe or unsound practice within the meaning of section 8 of the [FDI] Act.

(2)(A) …[T]he…agency may issue a directive to a banking institution that fails to maintain adequate capital at or above its required level… .

(B)(i) Such directive may require the banking institution to submit and adhere to a plan acceptable to the…agency… .

(ii) Any such directive…, including plans submitted pursuant thereto, shall be enforceable under the provisions of section 8(i) of the [FDI] Act to the same extent as an effective and outstanding order issued pursuant to section 8(b) of the [FDI] Act [i.e., a cease-and-desist order] which has become final.

For a description of the procedures followed by the FDIC in implementing this provision, *see* Metzger, *supra* note 176, at 239-40.

[189] *See, e.g.*, Board of Trustees of Knox County (Indiana) Hospital v. Sullivan, 965 F.2d 558, 561-63 (7th Cir. 1992) (distinguishing *Coushatta* on the ground that the statute under consideration was considerably more detailed than the ILSA). See also the extensive criticism of this aspect of the *Coushatta* case in Deal, *supra* note 168, 205-10.

[190] 486 U.S. 592 (1988).

[191] *Id.* at 610.

would have to do so on the basis of policy arguments (as to which, see below) and not "tradition" (which is hardly appropriate in the novel realm of PCA).[192]

iv. Importance of Context

The problem with either of the approaches just described is that, taken on their own, they tend to treat the question of reviewability as if one could reach a uniform answer about every agency action that might be taken within the statutory territory in question. Yet this ignores the great range and variety of circumstances in which disputes might occur. For example, a dispute concerning the allocation of a bank's loan loss reserves and the number and amount of its classified assets would bear very different characteristics from a dispute concerning the specific actions that need to be taken to improve the bank's capital ratio. The former relates to identifiable and quantifiable assets; although the quality of those assets might be subject to differing judgments, their evaluation will fall within a relatively manageable range of possibilities that can be tested through expert evidence and subsequently evaluated for reasonableness by a reviewing court. The latter, on the other hand, will involve more speculative predictions concerning the comparative feasibility and success of many different strategies that might be available; while even this kind of judgment ought to be informed by competent and experienced judgment, the range of reasonable possibilities is likely to be greater and less manageable, and the scope of obstructive argumentation may be a good reason for restricting review.

These differences highlight the importance of the contexts within which reviewability should be considered. The law relating to reviewability, even though codified in the APA, is largely the product of judicial elaboration.[193] In the absence of clear and convincing congressional intent to preclude review it is unrealistic to assume that one or two cases will settle the question of reviewability for all contexts.[194] As two leading commentators have observed, "whether you obtain review depends very much on *what type of claim* you are making."[195] Hence it is also important to consider the diverse situations in which judicial review will arise.

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[192] Compare, *e.g.*, Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317 (1958) (Justice Douglas, concluding that the decision by a government agency whether to initiate proceedings for setting new tolls for use of the Canal was not subject to review, observed that "the present conflict rages over questions that at heart involve problems of statutory construction and cost accounting… . These are matters on which experts may disagree; they involve nice issues of judgment and choice…which require the exercise of informed discretion").

[193] *See generally*, K.C. Davis, Treatise, *supra* note 173, at 266-83, §§28:4-6.

[194] *See, e.g., id.* at 257-59, §28:2. Even in the *Panama Canal* case, *supra* note 192, Justice Douglas acknowledged that "[w]here the matter is peradventure clear,…then judicial relief is often available." 356 U.S. at 318.

[195] S.G. Breyer & R.B. Stewart, ADMINISTRATIVE LAW AND REGULATORY POLICY 1021 (3 ed. 1992) (emphasis in original).

2. Potential Vehicles for Judicial Review

Whatever the potential scope or basis for review, it is clear the there are many potential circumstances in which a judicial challenge to PCA or PCA-related action might arise.

a. Default Federal Jurisdictional Provisions

If judicial review were to take place under the APA's §702, as there is no specific jurisdictional statute review would take place in a federal district court,[196] and the remedy would be sought under the APA (§706(1) or (2)), and, if necessary, the declaratory and injunctive relief statutes.[197]

b. Review in Judicial Enforcement Proceedings

PCA determinations made in terms of section 38 can be enforced under the judicial enforcement provision in section 8(i)(1) of the FDI Act. This provision permits the agency to seek enforcement of its PCA orders in a federal district court. Section 8(i)(1) also denies any court "jurisdiction to affect by injunction or otherwise" "or to review, modify, suspend, terminate, or set aside" any order or notice under section 38, "except as otherwise provided under this section or under section 38... ."

At first sight, §8(i)(1) might seem to preclude review of the underlying validity of PCA determinations and orders in the enforcement proceedings.[198] The wording, however, is by no means clear on this point. For example, §8(i)(1) does not state that the *enforcing* court cannot review the validity of the determination or order: it merely indicates that a litigant must use avenues of litigation otherwise available under section 8 (review in the court of appeals following formal enforcement orders)[199] or under section 38 (where there are none).[200]

Indeed, the APA itself contemplates the possibility of review in civil and criminal enforcement proceedings[201] and, as John Deal forcefully argues, "[n]either the APA nor the Supreme Court's jurisprudence under 5 U.S.C. §701(a) prevents a court from performing its normal judicial functions when its jurisdiction is invoked by an Executive Branch agency to enforce an action of the agency."[202] He notes that section 703 of the APA[203] expressly contemplates this possibility: section 703 provides that "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil… proceedings for judicial enforcement."[204]

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[196] 28 USC §1331.

[197] 28 USC §§2201 and 2202.

[198] *See, e.g., Coushatta*, 930 F.2d at 1126.

[199] §8(h)(2), 12 USC §1818(h)(2).

[200] *See also* Deal, *supra* note 168, at 194-95.

[201] 5 USC §703.

[202] Deal, *supra* note 168, at 210.

[203] 5 USC §703.

c. Review in Connection with a Related Formal Enforcement Action

Some form of judicial review is also possible if a banking agency chooses to take formal enforcement action in circumstances to which PCA action is also relevant. This can occur in one of two ways.

First, the agency's PCA determinations (and violations of its S/S standards, for that matter) can be sanctioned by means of civil money penalties.[205] If the agency chooses this course of action, it must afford the individual or institution affected a formal agency hearing before making a final assessment of penalties.[206] The agency's final decision is thereafter subject to judicial review in a U.S. court of appeals, and the decision is reviewed under the standards prescribed in chapter 7 of the APA.[207]

Second, if the capital classification of an institution has been downgraded as a result of a less-than-satisfactory MACRO or CAMEL rating, it is conceivable that the condition or conduct giving rise to the unsatisfactory rating may also form the predicate for formal enforcement under any of the many provisions of section 8 of the FDI Act. The agency may decide to take targeted enforcement action instead of or in addition to using its PCA powers. If it chooses to do so, the respondent will be entitled to formal administrative adjudication and judicial review in a U.S. court of appeals.[208]

Because in either of these circumstances "[r]eview of such proceedings shall be had as provided in chapter 7 of [the APA],"[209] it is possible that the reviewing court may treat certain aspects of the agency's decision as nonreviewable under section 701.[210] This is by no means certain, however, for at least two reasons. First, it is quite common for examiners to testify in formal enforcement proceedings. They are often subjected to vigorous cross-examination. Hence, the difficulty of reviewing the actions of examiners will not be as great where there have been formal enforcement proceedings. Second, the evidence that formed the basis of the enforcement action will be part of a formal record before the court and will therefore be quite easily accessible for review. A reviewing court is likely to be inclined to review the evidence underlying the enforcement action, and that evidence is going to be the same evidence that would underlie PCA action.

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[204] *See* Deal, *supra* note 168, 198-99, 202-03. *See also* Administrative Conference of the United States, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 208 (2 ed. 1992); U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 99-100 (1947).

[205] FDI Act §8(i)(2)(ii).

[206] *Id.* §§8(i)(2)(H), 8(h)(1).

[207] *Id.* §8(h)(2).

[208] *Id.* §8(h).

[209] *Id.* §8(h)(2).

[210] *See supra* text accompanying notes 169-195.

d. Conservatorship and Receivership Review

As far as the availability of judicial review is concerned, an anomalous situation has been created by the requirement in section 38 that, with limited exceptions, the agency should place a critically undercapitalized institution into conservatorship or receivership within a fixed time.[211] If section 38 is interpreted as precluding judicial review, this conclusion would run counter to the *express* provision for judicial review as far as the agencies' general powers to appoint conservators and receivers are concerned. The decision to appoint a *conservator* for an insured depository institution is subject to judicial review in the case of national[212] and federally insured state banks[213] as well as all federally insured savings associations.[214] The same provisions apply in the case of the appointment of *receivers* for federally insured state banks and federally insured savings associations. Provision for judicial review of the appointment of conservators and receivers for state member banks[215] and the appointment of receivers for national banks[216] is much less clear,[217] but it is possible that limited judicial review would be available in these situations as well[218] and it may well be that some form of judicial (or administrative) review is constitutionally required.[219]

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[211] *Id.* §38(h)(3).

[212] *See* the Bank Conservation Act §203(b), 12 USC §203(b)(1) (review in U.S. district court within 20 days of appointment, according to "arbitrary, capricious,...abuse of discretion" standard of review).

[213] FDI Act §11(c)(7), 12 USC §1821(c)(7) (review in U.S. district court within 30 days "upon the merits"). Judicial review is provided for even where the FDIC appoints itself receiver because the institution concerned is undercapitalized or critically undercapitalized "as defined in section 38(b)." FDI Act §11(c)(5)(K) & (L), 12 USC §1821(c)(5)(K) & (L).

It seems fairly settled that the "upon the merits" language, which is also used with regard to judicial review of thrift seizures (see the following note), is intended to trigger the "arbitrary, capricious or an abuse of discretion" standard of review. Some U.S. district courts have interpreted the "merits" language as indicating a more intrusive standard of review, but the courts of appeals have been in accord in interpreting it to conform to the less exacting, more deferential, standard. *See* Franklin Savings Association v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1141-42 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992); Woods v. Federal Home Loan Bank Board, 826 F.2d 1400, 1407 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); Guaranty Savings & Loan Association v. Federal Home Loan Bank Board, 794 F.2d 1339, 1342 (8th Cir. 1986). *See generally, e.g.*, Paul W. Grace, *Regulatory Seizure of Institutions*, in Zisman, *supra* note 98, 12-1 at 12-27 - 12-30.

[214] *See* Home Owners' Loan Act §5(d)(6)(B), 12 USC §1464(d)(6)(B) (review in U.S. district court within 30 days "upon the merits").

[215] The Fed was first given power to appoint conservators and receivers for state member banks as part of FDICIA's conservatorship and receivership amendments to facilitate PCA. *See* FDICIA §133(f), adding a new §11(p) to the Federal Reserve Act, 12 USC §248(p). The legislative history indicates no more than that Congress merely intended to ensure that all four federal banking regulators would have effective power to implement the PCA program; there is no reference to the reasons for not subjecting the Fed to the same requirements of judicial review as are applicable to the other banking regulators. The Senate Banking Committee's report, for example, merely prefaces its description of the conservatorship and receivership reforms ultimately enacted in FDICIA with the words "[t]o facilitate prompt corrective action." Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, to

If the judicial review provisions more generally applicable to conservatorships and receiverships are held to apply to PCA conservatorships and receiverships as well—and there is nothing in these provisions that suggests otherwise—the potential for challenging in court the underlying PCA determinations that led to the imposition of a conservatorship or receivership is obvious.

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accompany S. 543, together with Additional Views, S. Rep. No. 102-167, 102d Cong., 1st Sess. 42 (1991).

[216] Act of June 30, 1876, §1, 12 USC §191, amended by FDICIA §133(b) as part of FDICIA's conforming amendments to facilitate PCA, and redesignated as §2 of the "National Bank Receivership Act" by the Housing and Community Development Act of 1992, §1603(d).

[217] The new section 11(p) of the Federal Reserve Act, 12 USC §248(p), is silent on the question of judicial review, stating only that "[t]he Board may appoint the [FDIC] as conservator or receiver for a State member bank under section 11(c)(9) of the [FDI] Act."

The National Bank Receivership Act §2, 12 USC §191, provides that the Comptroller may appoint the FDIC as receiver "if the Comptroller determines, in the Comptroller's discretion," that any of the grounds specified in section 11(c)(5) of the FDI Act exist. These specified grounds are common to the appointment of conservators or receivers in the case of all federally insured banks and savings associations, but the National Bank Act makes no express provision for judicial review. The use of the phrase "in the Comptroller's discretion" has been interpreted by some courts to indicate that no right to review exists. *See, e.g.*, Joseph Jude Norton & Sherry Castle Whitley, BANKING LAW MANUAL 3A-23 at n. 2 (1989). But see the following note.

[218] Although some courts have assumed that the Comptroller's decisions to appoint receivers are not subject to judicial review, and while they have certainly regarded such decisions as not subject to *pre*-seizure judicial review and injunctive relief, several courts have acknowledged the possibility that *post*-seizure judicial review might be available as is the case with seizures by the OTS. *See, e.g.*, American Bank v. Clarke, 933 F.2d 899, 904 (10th Cir. 1991) (denying preclosure review but acknowledging possibility of post-closure review); United States Savings Bank v. Morgenthau, 85 F.2d 811, 814 (1936), *cert. denied*, 299 U.S. 605 (1937) ("the court will not substitute its judgment for the judgment of the Comptroller, unless it appears by convincing proof that the Comptroller's action is plainly arbitrary and made in bad faith"); *In re* American City Bank & Trust Co, N.A., 402 F. Supp. 1229, 1230 (E.D. Wis. 1975) (There is authority to the effect that such action by the Comptroller is entirely discretionary and, thus, not subject to judicial review. [Citations omitted.] The better view, however, is that the Comptroller's judgment is final unless it clearly appears that the action is arbitrary and taken in bad faith. [Citing *Morgenthau*]). *See also, e.g.*, Grace, *supra* note 213, at 12-17 - 12-18.

[219] The Supreme Court concluded in Fahey v. Mallonee, 332 U.S. 245 (1947), that due process does not require a pre-seizure hearing before a conservator can be appointed by the FHLBB. It did so, however, on the basis that such appointments were likely to be based on the need for emergency action, so that compelling interests permitted the government to avoid the usual due process requirement that a predeprivation hearing be granted. The Court did not, however, suggest that an adequate *post*-seizure hearing need not be granted. The courts appear to have accepted that due process is satisfied if a post-seizure hearing is supplied in the form of the right to judicial review of the conservatorship or receivership appointment. *See, e.g.*, Haralson v. Federal Home Loan Bank Board, 655 F.2d 1550, 1558 (D.C. Cir. 1987). *Cf. also* FDIC v. Mallen, 486 U.S. 230 (1988) (discussed briefly *supra* notes 161, 164).

3. Judicial Review Mandated by the Constitution

Under prevailing doctrine, judicial review of a PCA order would at least be available where the claim were to be based on a charge of unconstitutionality. It seems clear that some form of *post*-seizure hearing (if not *pre*-seizure hearing) would be required in a case where PCA action led to the seizure of the bank,[220] and an effort by an agency to avoid this requirement could provide the basis for judicial review even if the statute were to be interpreted as impliedly precluding judicial review.[221]

Even outside the context of full-scale seizures, it is possible that constitutional arguments can be made. For example, it might be argued that the dismissal procedure in section 38(n) (and the implementing regulations) denies the employee or director procedural due process because the burden of proof is almost insurmountable.[222] It might even be possible to argue that the capital classification process requires a due process hearing before adverse consequences could attach to an agency's capital classification of an institution.[223] Assuming that there is some merit in these arguments, there is little doubt that a due process claim could be brought in court, even if section 38 were construed to have precluded review.[224]

This avenue of review would, however, be restricted to *constitutional* challenges to PCA determinations and orders and, as such, would have limited utility in most situations (where the disputes are likely to revolve around the substantive appropriateness of the agency action in question).

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[220] *See supra* note 219.

[221] *See, e.g.*, McNary v. Haitian Refugee Center, 498 US 479 (1991); Webster v. Doe, 486 U.S. 592 (1988); Johnson v. Robison, 415 U.S. 361 (1974).

[222] *See, e.g., Executives Fired by FDIC Would Face Uphill Struggle; Due Process in Doubt*, 2(34) FDIC Watch 1 (Sept. 14, 1992) (reporting views doubting the constitutionality of the dismissal provision); and *see supra* text accompanying notes 161-164.

[223] John Deal and Thomas Metzger take the position that the Due Process Clause would actually trigger the formal adjudication requirements of the APA, §§554-57. *See* Deal, *supra* note 168, at 191-92; Metzger, *supra* note 176, at 249. These authors rely on *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), in which the Court ruled that the formal hearing requirements of the APA can be triggered, not only by "statute" (5 USC §554(1)), but also by the Constitution. The orthodox view among administrative lawyers is that *Wong Yang Sung* has been all but overruled, and it has certainly been largely ignored since it was decided. For example, the Court later accepted that Congress could act constitutionally in expressly overruling the effect of *Wong Yang Sung* by providing for a lesser form of hearing than that prescribed by the APA. Marcello v. Bonds, 349 U.S. 302 (1955). *See also* Ardestani v. Immigration & Naturalization Service, 112 S. Ct. 515, 518-19 (1991); and *see generally, e.g.*, ALFRED C. AMAN & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 203-04 (1992). It appears that procedural due process analysis follows a separate and more flexible track than that ordained by §554 of the APA. *See, e.g., id.* at 204-05. Nevertheless, Mr. Deal argues strongly that the drafters of the APA actually did intend the result reached in *Wong Yang Sung*, and that a faithful application of the APA would lead to a similar result in the context of capital directives. He also asserts that this is most clearly the case where an administrative sanction (including a capital directive) is subject to judicial review. *See* Deal, *supra* note 168, at 190-92.

[224] See the cases cited in note 221 *supra*.

IV. Principles for Reform

A. Shortcomings of the Present Processes

The preceding review has highlighted a series of unsatisfactory and anomalous features in the PCA process. Four seem to be particularly important.

1. Absence of Clear Protection Against Improper Classification Decisions

The importance of the basic capital classification of an insured depository institution was emphasized earlier in this report.[225] The capital category into which an institution is placed not only determines many of the rights the institution can or might enjoy but also forms the basis for any PCA action that may be directed towards the institution or its officers and directors. Yet, although the statute and the agencies' Final Rules make provision for some limited procedural protections in the case of safety/soundness reclassifications[226] and the implementation of PCA directives[227] and dismissal orders,[228] no specific procedural protections are provided in the case of the basic capital classification decisions themselves. Institutions can rely only upon the highly informal and discretionary policies for review of examination decisions that are currently provided by the agencies.[229]

These review policies are the product of the historical relationship between the agencies and the institutions under their charge: they assume a highly informal and continuous relationship between the institutions and regional supervisory officials, including the examiners, and they are designed to resolve disputes with the minimum of adversary friction. They also presuppose a complete absence of judicial review regarding the results of examinations. Unfortunately the conditions necessary for the success of these review policies seem to have eroded and to have been replaced by a growing concern on the part of depository institutions and their representatives that the examination process can be potentially capricious and that the protections against abuse of agency power in the examination process are inadequate.[230] If there was complete trust in the examination process in the past, this trust seems to have diminished: whether this is because more now turns on the results of the examination or because of an alienation between many institutions and their supervisory agencies is hard to tell, but trust seems nevertheless to have declined.[231]

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[225] *See supra* text accompanying notes 82-91.

[226] *See supra* text accompanying notes 137-140.

[227] *See supra* text accompanying notes 145-147.

[228] *See supra* text accompanying notes 158-160.

[229] *See supra* text accompanying notes 121-124.

Nor is the decline in trust merely the reflection of subjective perceptions in an industry that has been the recent butt of unexpectedly intensified regulation. Indeed, there seem to be some relatively objective data available that suggest that the examination process can lead to quite arbitrary results, depending on which agency's examiners are making the evaluations. Even before the creation of the PCA process, courts sometimes accepted that the banking agencies were capable, in particular cases, of acting arbitrarily.[232] The General Accounting Office recently released a study reporting its review of the agency examination process;[233] among its conclusions was a finding by the GAO that out of 20 thrift examinations reviewed, where the FDIC and the OTS had each performed examinations, the two agencies reached *different* safety and soundness ratings in nine of the examinations.[234] This finding is hardly surprising, given the extremely broad and subjective range of factors that must be considered by examiners and their supervisors when determining their final ratings,[235] but it also indicates the scope for potential error in situations where precision and consistency are becoming increasingly important.

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[230] *See, e.g.*, the joint letter from the major banking industry representatives to the President-elect, *supra* note 127.

[231] The erosion of trust, which has evidently been accepted by the President himself, was expressed by some leading banking lawyers (both within and outside banks, including highly successful ones) in letters and oral comments to the author in response to earlier drafts of this study.

[232] *See, e.g.*, Biscayne Federal Savings & Loan v. FHLBB, 720 F.2d 1499 (11th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) (where the trial court, without contradiction by the appeals court, characterized the agency's action as constituting "a pattern of outrageous conduct," "outlandish," "egregious," and "wrapped in a shroud of deception." *Id.* at 1052, quoting from the trial court findings); MCorp v. Clarke, 755 F. Supp. 1402, 1408 (N.D. Tex. 1991) (finding that a claim by MCorp that the FDIC had plotted with the Comptroller to engineer the insolvency of the entire banking family in order to secure a better post-seizure sale price for the package of institutions was supported by sufficient evidence to survive a motion for summary judgment).

[233] General Accounting Office, *Thrift Examination Quality: OTS Examinations Do Not Fully Assess Safety and Soundness* (GAO/AFMD-93-11) (Feb. 16, 1993).

[234] *Id.* at 36. *See also* Metzger, *supra* note 176, at 254 (citing another example of seemingly arbitrary examination classifications, given by a former bank examiner); Bleakley, *supra* note 126, at A14 ("Bankers complain that regulation is subjective and inconsistent").

[235] *Cf.* Macey & Miller, *supra* note 14, at 585:

> How scientific do the CAMEL ratings seem to you? Given that the bank examiner can give variable weighting to the five factors in determining the composite rating, and may consider factors other than the five specifically mentioned, isn't there a high level of subjectivity in the examination process? Are the ratings even logical? How can a bank's performance be "neither satisfactory nor unsatisfactory"?

The trend to formality in the examination process is surely regrettable. Effective examination and supervision of banking institutions depend ideally on a high degree of informality and cooperation between the agencies and the industry. Yet legislation such as FIRREA and FDICIA has rendered the old style of informality a potentially capricious process to which banks seem less willing to subscribe—and, given the new consequences, understandably so. Short of proposing, unrealistically, that Congress should reverse direction in its policies regarding bank supervision, there seems to be little alternative to the introduction of further, more formal, processes if the vital classification decisions are to be kept fair and subject to remedy in cases of abuse.

At the same time, even if the reforms proposed in this report regarding judicial review were not made, judicial review of the capital classification of an institution will sometimes be available, if only in the context of receivership review and review of enforcement actions.[236] Yet review without a meaningful record, even when confined to the arbitrary and capricious or abuse of discretion standards of review, is extremely difficult, if not impossible.[237] Unless judicial review is to be precluded altogether, or is to be a mere chimera, some kind of coherent record of the process leading to the final decision in dispute seems appropriate.

For these reasons, it is proposed below that a uniform, record-creating appeal process be instituted for all the federal banking agencies, which will apply in all cases where an institution's capital classification is determined or changed.

2. Uncertainty Regarding the Availability of Judicial Review

There is considerable doubt as to whether a reviewing court may probe into disputes relating to PCA classifications and determinations.[238] Yet, although a court might conclude that some or all forms of PCA action are actions "committed to agency discretion by law," this result is by no means certain. Even if judicial review were to be regarded as inappropriate in the PCA context, this uncertainty is likely to generate exploratory litigation and, given the differing views on the factors that should determine whether the exception to reviewability applies,[239] it is likely that courts will reach different conclusions, depending on the precise issues involved and the gravity of the particular decisions in dispute.

This report takes the view that certainty regarding judicial review is important. But it goes further to argue that in reaching a conclusion on reviewability, one should adopt a discriminating approach by identifying which of the PCA decisions ought to be subjected to potential judicial review and which are less important and less susceptible to review. The conclusion reached is that basic capital classification decisions, safety/soundness reclassifications, and PCA dismissals have such grave consequences for the institutions and individuals concerned that they should be subject to judicial review. It is also recognized, however, that ensuing PCA action, such as day-to-day decisions regarding the issuing, form and content of individual PCA directives, or the approval and supervision of capital restoration plans, are so highly discretionary and likely to require such varying responses to fluctuating conditions that they should not be subject to judicial review and that in these cases judicial review should actually be expressly precluded in order to remove any uncertainty.

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[236] *See supra* text accompanying notes 214-219, 206-208.

[237] The classic case in which such review was thought to be possible, even where no more than a few lines of a letter from the regulator formed the "record," was Camp v. Pitts, 411 U.S. 138 (1973).

[238] *See supra* text accompanying notes 171-195.

[239] *See supra* text accompanying notes 192-195.

3. The Anomalous Coexistence of PCA and Formal Enforcement Powers

A clear danger arising from the side-by-side coexistence of both formal enforcement powers and the PCA system is the possibility that an agency might choose to use its PCA powers instead of its formal enforcement powers in a situation where the predicates or procedures for the use of the latter are thought by the agency to be "too much trouble" to have to satisfy. It could be very tempting, for example, for an agency desiring to get rid of a troublesome yet perfectly law-abiding director, officer, or, for that matter, the entire management of an institution, simply to issue a series of PCA dismissal orders in order to avoid having to prove its complaints according to the standards prescribed for formal removals. Individuals who are subject to PCA dismissal deserve judicial protection from arbitrary agency orders. It is anomalous that they would enjoy such protection when they are charged with specific violations of banking laws or regulations and have formal enforcement action taken against them—perhaps even resulting in their removal from office,[240] yet they might not enjoy similar protection when being removed under a PCA dismissal order that might have resulted from the mere fact that their employer depository institution has suffered economic misfortune that has driven it into a capital category in which PCA dismissals might be ordered.[241]

Similarly, merely for the sake of convenience and increased leverage an agency could threaten PCA-based seizure of an institution in circumstances where less severe enforcement action would be more appropriate if properly based on the predicates of section 8. A PCA-based receivership might be far easier to impose than formal enforcement action, and the threat would be so severe that, without safeguards, it would be overwhelming, even to an institution that had a legitimate objection to the agency's demands.

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[240] *See* FDI Act §8(e)-(g), 12 USC §1818(e)-(g).

[241] *See also* the discussion *supra* text accompanying notes 163-164.

The proposals in this report for the introduction of a uniform, record-generating classification review process and the backup safeguard of judicial review are intended in part to provide a safeguard against the inappropriate selective use of PCA powers in situations where other actions, including possible formal enforcement action, ought to be taken instead.

4. Anomalous Inconsistencies Between PCA and Conservatorship/Receivership Powers

The most glaring anomaly of all is the disparity among the agencies regarding the availability of judicial review in the case of temporary or permanent seizure of an institution. As the law stands at present, if the Fed appoints a conservator or receiver for a state member bank, there is no apparent provision for judicial review. If the Comptroller appoints a conservator for a national bank, this decision is subject to judicial review. If the Comptroller decides, instead, to appoint a receiver, there may be no judicial review and even if there is, there is no statutorily-prescribed time limitation. If, on the other hand, the Comptroller or the Fed intends to appoint a conservator and the FDIC, after having been given notice of this intention, decides instead to appoint a receiver, the decision *will* be subject to review! And there are further anomalies as between the agencies, including varying time limits within which review must be sought.[242]

This report concludes that judicial review in the case of the appointment of both conservators and receivers is desirable. In the past, most receiverships were appointed when institutions were almost certainly insolvent. In such circumstances judicial review was rarely worthwhile because there was nothing left for the owners of the seized institution to fight about. The situation has now changed substantially. FDICIA *mandates* the seizure of an institution *that is still solvent*. Indeed, if the PCA system is working properly, the institution *ought* to be solvent when it is seized. FDICIA also permits the seizure of institutions that are quite possibly still substantially capitalized. For example, an institution which is classified as "undercapitalized" and which may have a capital leverage ratio of 3.9%[243] may be subject to seizure if, in a dispute with its regulator over the means (or even the necessity) of raising capital, the regulator believes that it has "fail[ed] to become adequately capitalized when required to do so."[244] If the institution has assets of $1 billion, and therefore an excess of assets over liabilities (at least in theory) of $39 million, the seizure of the institution will certainly leave something to fight over.

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[242] *See supra* notes 212-214.

[243] *See supra* text accompanying note 34.

[244] FDI Act §11(c)(5)(K). *See supra* text accompanying note 54.

This example highlights the need for some independent protection against arbitrary seizure for the institution's owners. PCA seizures constitute a very drastic deprivation of value from the institutions' owners. While drastic action might be justified in order to protect the deposit insurance funds from loss, it seems imperative that an external safeguard be provided to protect owners from abusive government action. This principle has long been recognized by Congress in the case of other, non-PCA seizures (where, ironically, an institution is more likely to be insolvent and worthless to its owners.)[245]

The report also concludes that there is no apparent reason for the discrepancies between the agencies regarding the availability of review. Hence, it is proposed that the judicial review provisions in the event of the appointment of conservators and receivers by the federal banking agencies should be rendered uniform.

B. Finding the Right Balance

1. Interests of Depository Institutions, their Directors and Officers, and Borrowers

The importance of judicial review, from the point of view of an affected institution or individual, is obvious. Under section 38, individuals can be dismissed from office; institutions can be forced to divest themselves of lucrative subsidiaries; holding companies can be required to guarantee the capital performance of their bank or thrift subsidiaries; and critically undercapitalized *though still solvent* institutions can (and eventually must) be placed into receivership.

PCA determinations will quite possibly represent the most intrusive forms of intervention by any agency into the realm of economic entrepreneurship. The drastic nature of PCA action prompts a concern for protecting individuals and institutions against arbitrary agency action. This concern is heightened by the fact that virtually all subsequent redress against an agency in the form of recovery by way of a tort suit for damages appears to be cut off by the "discretionary function exception" in the Federal Tort Claims Act.[246] Unless an arbitrary or obviously inappropriate PCA determination can be enjoined or reversed at an early stage, individuals and institutions who suffer injury as a result will be entirely without remedy.

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[245] *See supra* text accompanying notes 212-214.

[246] See *supra* note 165.

It is not only banks and bankers whose protection is important: their anxieties translate, in turn, into unduly conservative lending practices that, as the President and the four banking agencies have acknowledged, have contributed to the recent shortage of credit availability, particularly from small and medium-sized banking institutions.[247] In other words, borrowers may well be paying the price for an examination system that is perceived by bankers to be unpredictable and arbitrarily severe.

Embraced by these general considerations are some less obvious but equally important ones that have already been voiced in the context of the existing examination review process. First, some bankers seem to question the objectivity of the examination and examination review processes. This was the reason for the imposition by CEBA of an independent arbiter process for thrifts.[248] The problem has been voiced again publicly by industry representatives[249] and privately to the author. In part, the concern is for impartial decisionmaking as a remedy for the possible predilections and biases of individual examiners in cases where relations between the institution and the supervisors have become difficult. In part, the complaints seem also to be based on an anxiety about the potentially exaggerated impact that national political controversy might have on regional offices.[250]

The agencies seem with their examination review processes to have made a serious and commendable attempt to provide "head-office" relief. The OCC, for example, provides an entirely separate avenue of alternative relief directly to its Washington office,[251] the availability of which alternative remedy was emphasized to the author during his inquiries.[252] Unfortunately, the efforts by the agency head offices may not have resolved the underlying objections that the industry now has to the existing review process: the concern of bankers seems also to stem from a fear of retribution *in subsequent examinations* when the determinations of an examiner or regional supervisor are challenged. Indeed, this concern threatens to taint *any* internal agency review process, even if it is conducted at the Washington level. The apprehension was perhaps best expressed in a letter to the author from a leading and widely respected in-house banking counsel:

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[247] *See, e.g.*, *Remarks by the President...*, *supra* note 128, at 3; *Interagency Policy Statement on Credit Availability*, *supra* note 128, at 1.

[248] *See supra* text accompanying notes 122-124.

[249] *See* the joint letter, *supra* note 127.

[250] *See, e.g.*, Bleakley, *supra* note 126, at A14 (reporting complaints that ratings by field examiners are sometimes inappropriately downgraded by supervisors in reaction to political accusations of earlier laxity).

[251] *See* supra Part III, Chart 1.

[252] Letter from the Deputy Chief Counsel, OCC, to the author, dated Apr. 9, 1993. The Acting Comptroller of the Currency has also emphasized that the new appeal process currently being developed will include an official reporting directly to the Comptroller who, "[a]bove all, ...would make sure there was no retribution for anyone involved in an appeal." *Acting Comptroller Steinbrink Fills in Some Gaps ...*, *supra* note 130.

> I would be less than candid...if I did not voice the cynicism that most bankers I know share as to the efficacy of any intra-agency appeals process, the fear being that exercise of any appeal right risks retribution by the examiner or regional director at a later examination. When I was a regulator in Washington, I was convinced that such retribution would never occur; however, my experience in the industry is that it does occur. While former Treasury Secretary Brady tried to establish a mechanism that would preclude retribution, my sense is that few bankers trust it and have availed themselves of it, and I fear that even the best of intentions of President Clinton and his advisors (with whom we have worked on his credit crunch alleviation program) can overcome the practical problems of preventing later retribution.
>
> My sense is that, in theory, an appeal to Washington, DC agency headquarters does yield a fair review of the particular matter; it is the fact of seeking such an appeal that seems to bode ill later for banks availing themselves of the opportunity.[253]

One possible benefit of formalizing and standardizing the examination review process is that examiners might become more willing to accept appeal as a perfectly normal aspect of the supervisory process. In addition, the Washington, DC, agency offices might be more able to enforce proper respect for the review process more easily if it were written into formal agency practice.

Another concern expressed to the author is the lack of a record upon which to base any judicial challenge to agency examination determinations. In particular, the apparent inability to secure meaningful explanations of particular agency conclusions regarding such matters as asset classifications is a source of some frustration. On the other hand, the author was also informed that written appeal procedures would themselves be insufficient: given the highly discretionary nature of the determinations involved, it was argued that oral presentations, perhaps even at the Washington level, would be essential to a meaningful appeal process.[254] These concerns are understandable, yet they make strong demands on any proposed appeal process, and a compromise seems necessary in this regard if the agencies take the view, as they seem to do, that the efficient discharge of their PCA responsibilities requires that they retain control over whether proceedings should take an oral form.

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[253] Letter to author by Julius L. Loeser, Senior Vice President, First Interstate Bancorp, dated Mar. 26, 1993.

[254] Letter to author by Patrick B. Augustine, Executive Vice President and General Counsel, First United Bancorporation, dated Apr. 6, 1993 ("In matters involving "judgment" which is somewhat

Banks and commentators are also concerned about the fact that the review procedures are entirely discretionary and that they do not stay continuing enforcement or PCA action by the agencies concerned.[255] In view of the potentially severe infringement on the value of the institution that a capital classification might entail, these concerns are hardly surprising and need to be addressed. Once again, however, some compromise is probably necessary, and the proposed recommendations take this into account.

2. Agency Concerns

The banking agencies have been directed by Congress to intervene rapidly to prevent further losses to the deposit insurance funds. Rapid intervention is the primary purpose of the PCA system, and it inevitably entails having to make difficult, entrepreneurial decisions in a volatile world made all the more complicated by the fact that the agencies will be dealing with ailing institutions that are being buffeted by unfavorable economic forces. The notion of drawn-out judicial wrangling seems inimical to the whole concept of *prompt* corrective action.

The concern for rapid response to the emergencies that might confront a troubled institution is a powerful one. For this reason, it is difficult to see how one could reasonably require an agency to stay its hand in every situation where it is in dispute with the institution over the quality of the institution's assets, or the detailed form of PCA that the institution should be required to take. On the other hand, it does not follow that the agencies should always be able to rely on "urgency" as a justification for denying effective relief. As the procedures adopted in the Final Rules seem to contemplate, some disputes can be settled over a substantial period of time.[256]

There are also other, sometimes important, arguments that might be made against a more formal examination appeal process and against judicial review. First, it might be argued that the processes devised by the agencies in their Final Rules already provide significant safeguards for the individuals and institutions affected. This argument (in relation to the procedures accompanying capital

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subjective, personal meetings/appeals whereby parties can observe the interchange between the parties is helpful to a resolution of the matter").

[255] *See supra* text accompanying notes 125-127.

[256] *See, e.g., supra* Part III, Chart 3 (describing procedures allowing a 14-day response time before adverse safety/soundness reclassifications are implemented), p. 140, Chart 5 (describing 14-day response procedure before a PCA directive is finalized).

directives) carried considerable weight with the court in *Coushatta*, but, as an argument against judicial review, it tends to prove too much, since the same argument could be used against the availability of judicial review in the case of formal adjudications under the APA—where full judicial review has always been provided for and been thought appropriate.

Second, the banking agencies might be concerned that more formal internal review processes and subsequent judicial review of PCA issues would inevitably "put the examiners on trial," which might have the effect of inhibiting examiners who might be inclined to make decisions adverse to ailing institutions or individuals. This concern is also legitimate. The agencies have a strong interest, tested by long experience, in maintaining the integrity and efficiency of the supervisory process by keeping it as informal as possible. At the same time, however, it should also be noted that it is quite common for examiners to be "put on trial" in the formal enforcement process, where respondents are usually able to cross-examine them fairly intensively, and in anticipation of which the agency examination manuals even advise examiners to prepare careful records.[257] Furthermore, examiners and their agencies enjoy substantial deference from reviewing courts[258] and, at least in theory, examiners ought not to anticipate that they will be second-guessed where their determinations do not appear to be arbitrary.[259]

A third concern is that the kinds of records that would underlie PCA orders would often be unsuitable for judicial review because they involve such highly discretionary, on-site judgments that the record would not reflect the real reasoning behind the determinations that gave rise to the orders. Asset classifications might provide a good example: the appraisal of assets is a matter involving sensitive judgments informed by local experience that is hard to articulate. In other words, some PCA determinations may be based on highly discretionary judgments that are not very susceptible to external review. Justice Holmes, when the principles governing judicial review of discretionary agency action were much more rudimentary than they are now, once described such decisions as expressing "an intuition of experience that outruns analysis and sums up many unnamed and tangled impressions; impressions that lie beneath consciousness without losing their worth."[260] Despite the greater dexterity of reviewing courts in the modern world, his observation retains a solid core of wisdom that should not be disregarded.

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[257] *See, e.g.*, FDIC Manual, *supra* note 102, at 1.1-15 - 1.1-16 (providing guidance on the requisite level of detail and style for examiner's reports).

[258] *See, e.g.*, Franklin Savings Association v. Director, Office of Thrift Supervision, 934 F. 2d 1127 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992) (repeatedly emphasizing the need for a reviewing court to show deference to the examiner and the banking agency); Sunshine State Bank v. FDIC, 783 F.2d 1580, 1583 (11th Cir. 1986).

[259] *See, e.g.*, *id.* at 1584: "Unless shown to be arbitrary or capricious or outside a zone of reasonableness, the ALJ, the Board, and the courts must give significant deference to these experts [i.e. the examiners]."

Yet, while his is a powerful argument against judicial review *in some situations*, which would support a conclusion that certain decisions, at least, have been "committed to agency discretion by law," it is also evident that many other areas of PCA decisionmaking do not involve such finely tuned judgments. In fact, the agencies have themselves argued at times that aspects of the examination process involve mere computations,[261] and examiners are urged by the agencies to provide comments in their reports that are "factually objective."[262] Where standards are relatively well understood, there is no reason to assume that a court could not tell when they have been arbitrarily disregarded.

3. Demands and Limitations of Judicial Review

Subjecting PCA determinations to judicial review would inevitably entail some risk to the efficiency and integrity of the PCA system. The ultimate task is striking the right balance between the demand for some judicial protection against arbitrary agency action and the need of the agencies to be able to discharge their responsibilities efficiently and without merely strategic obstruction by institutions and individuals who are subject to the agencies' actions. Two problems seem particularly important.

a. The Continuing Supervisory Relationship

Even though bankers have expressed some frustration with the role of examiners, the bank supervisory system is totally dependent on these officials. Notwithstanding the trend to increased formality that has been spurred by FIRREA and FDICIA, it is likely that the examination process will remain, and should remain, highly informal in the great majority of examinations. Any restrictions imposed by the availability of judicial review should therefore be limited as far as possible, so as not to undermine the responsibilities and authority of examiners.

This report therefore proposes that the standard of judicial review of the discretionary elements of capital classifications and safety/soundness reclassifications be restricted to the most basic, default standard currently available under the APA, namely, the "arbitrary, capricious, or an abuse of discretion" standard stipulated in section 706(2)(A) of that Act. This standard, coupled with the deference that the courts already accord the evaluations of examiners,[263] should reassure examiners that their decisions will not be second-guessed in the ordinary course of events. At the same time, the mere availability of judicial review, even under the arbitrary and capricious standard, would provide a backup safeguard for institutions that believe themselves to be the subject of truly abusive agency action.

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[260] Chicago, Burlington & Quincy Railway Company v. Babcock, 204 U.S. 585, 597 (1907).

[261] This was one of the FDIC's arguments *against* reviewability in *Coushatta*. Brief for the FDIC, FDIC v. Bank of Coushatta, 930 F.2d 1125 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 170 (1991) ("All that is even arguably left for review is the arithmetic by which the agency establishes the current [capital] level." *Id.* at 23).

[262] FDIC Manual, *supra* note 102, at 1.1-15 - 1.1-16.

b. "Reviewing the Unreviewable"?

A conceptual problem is the possibility that examination ratings and capital classifications might be *inherently* unreviewable. As was observed earlier, many of the standards examiners must apply are highly subjective.[264] Yet many of the standards that must be applied, some of which are clearly stipulated by the PCA statute and Final Rules, are also quite objective and probably capable of independent evaluation. Furthermore, while it is true that some of the examination assessments are highly discretionary, it does not necessarily follow that the mere presence of discretion—even complex discretion—will render the final result absolutely unreviewable. As it was put by a prominent banking lawyer with extensive personal experience in these matters, "[t]o a country lawyer like me it is not clear that the problems the federal banking agencies deal with are more difficult to understand or more dangerous to the public than those dealt with by the Nuclear Regulatory Commission, the Food and Drug Administration, or the Federal Aviation Administration."[265]

This observation is a powerful one: there seems to be no obvious reason why banking determinations should be regarded as unreviewable merely because they are *complicated*. There may be many reasons (including the complexity of the decisions under review as well as others canvassed in this report) for restricting the *depth* or *standard* of review and the time limits relating to judicial relief, but these are not reasons for denying judicial relief altogether.

4. Crafting Realistic Protection

The preceding discussion suggests that a balance needs to be struck, as far as both the provision of internal agency remedies and the availability of judicial protection are concerned. The following proposals represent the author's effort to strike the necessary compromises.

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[263] *See supra* text accompanying note 258.

[264] *See supra* text accompanying notes 232-235.

[265] Memorandum to the author by John C. Deal, Esq., dated Mar. 30, 1993.

V. Specific Proposals

A. Proposed Recommendations

1. Administrative Appeals of Classification Decisions

a. The federal banking agencies should promulgate rules providing for an appeal to the agency by a depository institution of a decision of an examiner or regional director that has the effect of downgrading the capital classification of the institution (including a decision by the examiner to assign the institution a less-than-satisfactory rating for asset quality, management, earnings, or liquidity).

b. The appeal procedures should provide that, before issuing a final determination, the agency should:

(1) give notice to the affected institution of its right to appeal;

(2) provide the institution with a written report clearly stating all of the reasons for the adverse classification or rating; and

(3) permit the institution to supply further facts and information, make written representations, and, in the agency's discretion, present oral testimony and argument, in support of a more favorable classification or rating.

The procedures should also provide that the agency should issue its final decision within a specified time.

c. The agencies should specify in their rules whether a decision downgrading an institution's capital classification will ordinarily take effect regardless of whether an internal appeal is taken or will ordinarily be stayed pending completion of the internal appeal process. The agencies' rules should make appropriate provision for either a stay of effectiveness or an immediate effective date, as appropriate, where special circumstances justify such a departure from regular practice.

2. Judicial Review of Final Agency Decisions

a. Congress should amend Section 38 of the Federal Deposit Insurance Act, 12 U.S.C. §1831o, to permit a depository institution that has suffered an adverse capital classification, or a person who has been dismissed pursuant to section 38(n) of the Act, 12 U.S.C. §1831o(n), to seek judicial review of the federal banking agency's final decision in a federal district court.

(1) The party should be required to seek review within ten days of receiving notice of the agency's final decision.

(2) The court should review the agency's decision under the standards of judicial review set forth in 5 U.S.C. §706.

(3) Whether the agency's ruling is stayed pending judicial review should be determined by the agency in the first instance and by the court if need be according to the usual standards for granting stays.

b. Congress should amend Section 38 of the Federal Deposit Insurance Act, 12 U.S.C. §1831o, to clarify that it does not preclude judicial review of decisions to appoint a conservator or receiver under the terms of section 38(h)(3), 12 U.S.C. §1831o(h)(3), to the extent that such decisions are already otherwise reviewable.

c. In addition, Congress should amend Section 2 of the National Bank Receivership Act, 12 U.S.C. §191, to provide for judicial review of decisions to appoint receivers for national banks, and Section 11(p) of the Federal Reserve Act, 12 U.S.C. §248(p), to provide judicial review of decisions by the Board of Governors of the Federal Reserve System to appoint conservators and receivers for state member banks.

d. Congress should also amend the provisions relating to judicial review of decisions by all the federal banking agencies to appoint conservators and receivers so as to provide for:

(1) a consistent standard of review in accordance with 5 U.S.C. §706; and

(2) consistent time limits within which judicial review should be sought after a conservator or receiver has been appointed.

e. Congress should amend Section 38 of the Federal Deposit Insurance Act, 12 U.S.C. §1831o, to preclude judicial review in the case of all other prompt corrective action decisions and directives made by the federal banking agencies.

B. Commentary

The net effect of these proposed recommendations would be to introduce a limited element of formality into the examination process that governs federally insured depository institutions, leave the procedures already developed by the federal banking agencies for the exercise of their PCA powers in their current form, and establish clarity and consistency regarding the availability and standard of judicial review by providing for a limited form of expedited judicial review at the "triggering" stages of prompt corrective action. As such, the proposals attempt to strike a compromise between the competing interests of both the agencies and those affected by their actions.

1. Administrative Appeals

Proposed Recommendation 1 would change the present, highly informal, examination process by providing a right on the part of an institution to a somewhat more formal appeal than is currently available in the case of classifications based on capital condition alone.[266] The upgrading of the capital classification appeal process is considered essential given the fact that the FDICIA has substantially changed the framework in which examinations take place.[267]

Proposed Recommendation I would structure the internal examination review process by adding a formal right to agency review, requiring a written record, and imposing deadlines for final decision.[268] The recommendation does not, however, require the establishment of an independent arbiter system like the one provided by CEBA.[269] The institution pursuing the appeal could, however, submit the testimony of outside arbiters as part of its evidence. Given the availability of judicial review under *Proposed Recommendations II(A)* and *(B)*, independent arbitration does not seem to be essential for safeguarding the institution's rights. The opportunity to present oral testimony and introduce oral evidence would not be available as a right, but an agency would be expected to permit such evidence where the circumstances clearly demand it, and this decision would ultimately be subject to judicial review where a party could demonstrate that the opportunity was arbitrarily denied. The proposed review process would also operate *in addition to* the existing informal avenues of review that the agencies have provided, so that earlier opportunities to resolve a dispute orally and perhaps amicably would still remain.

Proposed Recommendation I(C) is designed to provide clarity as to when an agency's reclassification determination will take effect. The proposal leaves the discretion as to the moment of effectiveness with the agency. This permits the agency to act quickly if the circumstances demand prompt action. On the other hand, the proposal would also require the agency to be clear about its intentions. Clarity is important because the legal consequences of reclassifying the institution can be automatic[270] and the practical impact of a dismissal, whether final or pending, is immediate. Clarity is also important for identifying when the classification or dismissal is "final" for the purpose of judicial review.[271]

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[266] On the other hand, the right to appeal proposed in this report does not differ substantially from the right of appeal now provided for in the case of reclassifications based on noncapital considerations (i.e., based on unsafe or unsound conditions or practices). *See supra* Part III, Chart 3.

[267] *See* the discussion *supra* text accompanying notes 22-29.

[268] The CEBA provision imposes two deadlines: arbiter review must be completed within 25 business days and review by the PSA must be completed within a further 20 days. 12 USC §1442a(e).

[269] *See supra* text accompanying notes 122-124.

[270] For example, the institution, if downgraded from well capitalized, can no longer receive brokered deposits. *See supra* text accompanying notes 43.

[271] *See* 5 USC §704.

2. Judicial Review of "Basic" Decisions

As reviewed earlier in this report, the availability of judicial review of PCA actions is very unclear. *Proposed Recommendation II* would clarify the situation by making specific provision for judicial review in the case of the most serious of the PCA determinations and expressly precluding judicial review in the case of the more highly discretionary, "secondary" PCA directives.

a. Classification Decisions and PCA Dismissals

The report identifies as the most serious of all the PCA determinations those relating directly to capital classifications, dismissal of directors or officers, and seizure of institutions. In the case of the latter two forms of PCA determination, it has been shown that judicial review would ordinarily be available were the agencies to take identical action under other statutory provisions. Even in the case of capital classifications, the decisions of examiners are sometimes the subject of judicial review as part of an enforcement action under review or a challenge to a seizure. If *Proposed Recommendation I* were to be adopted, review of capital classifications would be rendered more feasible because there would be a written record concerning the issues in dispute.

Proposed Recommendation II(A) places judicial review in a U.S. district court. This is consistent with the provisions relating to judicial review of receiverships and conservatorships. Judicial review in a district court seems appropriate because the record concerning the supervisory decisions underlying capital classifications and PCA dismissals and seizures is likely to be somewhat informal, there having been no formal agency hearing.

Subrecommendation II(A)(1) places a 10-day limit on a party seeking judicial review. This time limit accords with the time limits governing judicial review of temporary orders under section 8.[272] PCA actions are likely to become necessary in a "crisis environment" where time is of the essence.

Under proposed *Subrecommendation II(A)(2)*, the standard of judicial review of the discretionary elements of the agency's decision is the narrowest standard normally applicable in administrative law.[273] Review of the agency's decisions on matters of fact and policy would be confined to the "arbitrary, capricious, or abuse of discretion" standard of section 706(2)(A) of the APA.[274] Because the agency decision would not be based on formal, on-the-record adjudication, the substantial evidence standard would not apply.[275] This seems appropriate in a situation where considerable deference toward the agency is necessary in a highly discretionary area of administrative decisionmaking.[276] And because there would be no formal agency record or prior adjudicative hearing, alternative, possibly more intrusive, standards for review such as the "substantial evidence" standard would be inappropriate.

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[272] *See* FDI Act §8(c)(2) (temporary cease-and-desist orders), §8(f) (suspension and prohibition orders).

[273] *See* 5 USC §706(2)(A).

[274] 5 USC §706(2)(A).

Proposed Recommendation II(A)(3) addresses the question whether a banking agency's classification determination, decision to order a dismissal, or decision to impose a conservatorship or receivership should be stayed pending judicial review. The proposal does not *require* a stay of agency action pending judicial review. Given the promptitude with which the agencies must act in some of the situations contemplated by section 38, a mandatory stay requirement seems unduly inflexible. The banking agencies do indeed enjoy a discretionary power to stay their action,[277] and it seems appropriate that this decision should remain in their hands.[278] As *Proposed Recommendation II(A)(3)* is currently formulated, a court would not be prevented from ordering a temporary stay to preserve the petitioner's rights pending completion of review proceedings.[279] It would be expected, however, that the court's discretion to issue a stay would be exercised sparingly, with the presumption against interfering with the agency's right to take immediate action being a heavy one.[280]

b. Conservatorships and Receiverships

Proposed Recommendation II(B) seeks to eliminate the present uncertainty and anomaly regarding the right to judicial review in the case of conservatorships and receiverships imposed under section 38. The inconsistency between the legislative provisions providing for a right to judicial review in the case of state member bank and savings association receiverships, on the one hand, and national and state nonmember bank receiverships, on the other, has already been noted.[281] The all-purpose provision stipulating the grounds upon which a conservatorship or receivership may be imposed by the FDIC, OTS *and* the OCC, namely section 11(c)(5) of the FDI Act, clearly contemplates conservatorships and receiverships imposed as a result of the capital condition of the institution concerned.[282] In the same subsection provision is made for judicial review of decisions by the FDIC to impose a conservatorship or receivership under section 11(c)(5),[283] and similar provision for judicial review is also made where it is the OTS that makes the appointment.[284] Yet no express provision is made, either in section 38 or in the National Bank Receivership Act, for judicial review where the appointment of a receiver is made by the Comptroller of the Currency.[285] Nor is provision made for judicial review of decisions by the Fed to appoint conservators or receivers for state member banks.[286] This inconsistency lacks any principled justification.

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[275] The substantial evidence standard applies only to on-the-record decisionmaking. *See* 5 USC §706(2)(E).

[276] *Cf., e.g.*, Franklin Savings Association v. Director, Office of Thrift Supervision, 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992).

[277] *See* 5 USC §705. I am grateful to Professor William Funk for drawing my attention to the significance of §705 in the PCA context.

[278] Permitting the agencies to retain discretion in this regard could give rise to serious hardship. By refusing a stay, the agency's seizure of an institution may render subsequent judicial review either futile or inadequate as a remedy. Yet it is easy to imagine a situation in which an agency may simply *have* to take irreparable action—say, seizing a critically undercapitalized institution within days of the determination that it is critically undercapitalized in order to prevent even greater possible harm occasioned by further delay. It is difficult to see how the agency could be enjoined from action without simultaneously undermining the agency's statutory responsibilities.

[279] *Cf.* 5 USC §705 (providing for the grant of a stay by the reviewing court in the case of irreparable injury). But cf. FDI Act §8(i)(1) (precluding any injunctive relief not provided for in section 38).

[280] To ensure that courts do not intervene lightly, the amendment to section 38 could require the institution or individual seeking the stay to demonstrate that the grant of a stay would not create a danger of further dissipation of the assets of the insured depository institution or threaten losses to the deposit insurance fund.

The opportunity should also be taken to introduce consistency regarding the standard of judicial review. The Bank Conservation Act states clearly the standard that courts have had to deduce from the more obscure language used in the case of state nonmember banks and thrifts.[287] The provision relating to appointments by the Fed states no standard at all. A uniform application of the arbitrary and capricious standard would be consistent with the appropriate level of deference, the state of the record, and the apparent desires of Congress in at least the case of national bank conservatorships.

Finally, there seems to be no reason for different time limits for judicial challenge.[288] These could be rendered uniform for all four agencies.

3. Preclusion of Judicial Review in Other PCA Situations

Proposed Recommendation II(C) would expressly preclude judicial review in all other cases involving PCA action, with the important exception of PCA seizures.

This proposed subrecommendation acknowledges the highly discretionary nature of PCA directives and the need on the part of the agencies to be able to act quickly in order to respond to the difficulties faced by a troubled institution. The agencies have already established internal procedures for the review or reconsideration of their PCA directives and, while judicial review would seem theoretically to follow from this process, the delaying consequences of the judicial process have the potential to undermine the entire PCA enterprise.

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[281] *See supra* text accompanying notes 212-219.

[282] FDI Act §11(c)(K) & (L), 12 USC §1821(c)(5)(K) & (L).

[283] FDI Act §11(c)(7).

[284] *See supra* text accompanying note 214.

[285] *See supra* text accompanying note 216.

[286] *See supra* text accompanying note 215.

[287] *See supra* text accompanying notes 212-214.

[288] *See supra* notes 212 and 214.

VI. Remaining Questions

This report leaves some related questions unanswered. In particular, no recommendations are offered with respect to the standard that a director or officer dismissed under section 38 must satisfy in order to secure reversal of his or her dismissal.[289] Nor does the report consider whether the lack, on the part of such a director or officer, of any right to an oral administrative hearing or the right to present witnesses[290] is unfair and should be remedied.

Issues arising out of the development and implementation of safety/soundness standards under section 39 of the FDI Act[291] are also likely to have an impact on the way in which PCA powers are exercised. Because the final rules relating to these standards have not yet been finalized, however, an investigation of this dimension of the PCA regime seems premature at this stage.

Finally, it may be that the federal banking agencies should develop clear, understandable principles regarding the way in which they will make choices between proceeding under sections 38 and 39 of the FDI Act, on the one hand, and sections 8 and 11 of the Act, on the other. PCA, safety/soundness standard-setting, formal enforcement, and conservatorship/receivership issues have all become closely intertwined since the enactment of FDICIA and in the new climate that favors aggressive agency action to prevent losses to the deposit insurance funds. At this point, however, it may be appropriate to allow time for the accumulation of agency experience and judicial evaluation before attempting to identify what should be the fairest principles governing the agency choice of powers.

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[289] *See* §38(n)(3) ("[t]he petitioner shall bear the burden of proving that the petitioner's continued employment would materially strengthen the insured depository institution's ability (A) to become adequately capitalized... [or] (B) to correct the unsafe or unsound condition or unsafe or unsound practice"). *See supra* text accompanying notes 156-164.

[290] *See supra* Part III, Chart 6.

[291] *See supra* text accompanying notes 66-68.

Report for Recommendation 93-3

Peer Review in Awarding Discretionary Grants in the Arts and Sciences

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

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Introduction

A country must have a strong and vibrant research and development capacity if it is to thrive in the rapidly emerging post-industrial world. To achieve this end, most of the industrialized nations have decided that government must play a prominent role in assembling and sustaining a sound scientific and engineering infrastructure. Most modern governments provide financial support for other professional endeavors, such as the fine arts, though usually on not as grand a scale. Although many procedural vehicles exist for making the difficult scientific and artistic judgments that necessarily arise in deciding which of a large pool of applicants will receive limited governmental resources, the United States has depended to a very large degree upon "peer review" grant systems in which the governmental decisionmaker assembles a group of the grant applicants' peers for advice. Under this peer review model, the government does not attempt to persuade researchers to undertake particular research or artists to create particular kinds of art. Instead, a granting agency allocates sums of money to entire fields and allows the researchers, artists, or performers to develop creative proposals for projects.[1] A group of "peers" with expertise in the relevant area then evaluates and ranks proposals, leaving the ultimate funding decisions up to the governmental officials in charge of the relevant programs.

The peer review process has proved remarkably durable in the 30-40 years during which federal agencies have employed it. It is, however, far from perfect. This report focuses on one especially worrisome criticism of peer review systems for awarding discretionary grants—that they are capable of both ad hoc and systematic bias for and against individuals, groups, and innovative new ideas.[2] After taking some measure of the validity of this criticism, the report will compare the peer review model to the primary competing model for awarding discretionary grants—the "strong manager" model. Concluding that on balance the peer review model is most appropriate for awarding discretionary grants in the arts and sciences, the report will suggest some procedural reforms that should help reduce the potential for bias at relatively little cost.

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[1] The above description is somewhat idealized to the extent that it suggests that the funding agencies do not attempt to steer research. Obviously, budgetary decisions about which programs get what funds send messages to potential researchers about where they should direct their efforts. Sometimes the signals can be more direct as, for example, when NSF refused to continue funding the one of five supercomputer centers that used a particular brand of computer. *See* Ellis Booker, *NSF Cuts Supercomputer Grant*, COMPUTERWORLD, October 30, 1989, at 127.

[2] The report will not examine the closely related question of whether the funding programs themselves are biased toward or against funding research aimed at benefiting particular groups. The report will, however, examine claims that the system is biased for or against particular researchers. For example, one of the most frequent criticisms of peer review systems is that they result in "old boy" networks.

A. The Nature of the Peer Review Process

A "peer review" system of allocating governmental resources relies primarily upon the informed recommendations of experts in the relevant field of inquiry.[3] First employed more than 300 years ago for evaluating the scientific merit of journal articles, it was adopted by the National Advisory Cancer Council and the Office of Naval Research in the 1930s and 1940s for assessing applications for scientific grants. In the ensuing years the peer review model has evolved into a highly regularized vehicle for awarding research grants that "legitimates the flow of resources and the establishment of priorities" in the scientific granting agencies.[4] By the mid-1980s the Board of Directors of the American Association for the Advancement of Science could conclude that "the scientific community has accepted primary responsibility for defining research needs and opportunities and providing insurance that public funds are allocated on a priority basis through peer review."[5] It is nevertheless true that "[s]cience flourishes all over the world without the use of individual proposal peer review."[6]

Peer review in the arts is of even more recent vintage. Until the mid-1960s, private arts patrons rarely invoked formal peer review as a vehicle for making funding decisions.[7] With the creation of the National Endowments for the Arts and Humanities, however, the federal government became the nation's most prominent single fine arts patron, and both institutions borrowed the peer review model from the scientific funding agencies. As with the scientific agencies, peer review has helped legitimate NEA funding decisions among the practitioners of the arts, though not necessarily among members of the general public.[8]

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[3] Chubin and Hackett define peer review as: "An organized method for evaluating scientific work that is used by scientists to certify the correctness of procedures, establish the plausibility of results, and allocate scarce resources (such as journal space, research funds, recognition, and special honor)." D. CHUBIN & E. HACKETT, PEERLESS SCIENCE: PEER REVIEW AND U.S. SCIENCE POLICY 20 (State University of New York Press, 1990). [hereinafter cited as Chubin & Hackett] A House subcommittee report on peer review in NSF defines "peer review system" as "any method of evaluating a specialized creation - such as a proposal to perform scientific research - which involves having a group of people knowledgeable in the area of specialization evaluate the creation." National Science Foundation Peer Review: Report of the Subcommittee on Science, Research and Technology of the House Committee on Science and Technology, 94th Cong., 2d Sess (1976), at 13 [hereinafter cited as 1976 House Hearing Reports].

[4] D. Chubin & S. Jasanoff, *Peer Review and Public Policy*, 10 SCIENCE, TECHNOLOGY & HUMAN VALUES 3 (1985). *See* also Chubin & Hackett, *supra* note 3.

[5] American Association for the Advancement of Science Board Statement on Politics and Science, 223 Science 27 (Jan. 1984).

[6] R. Roy, *Funding Science: The Real Defects of Peer Review and an Alternative To It*, 10 SCIENCE TECHNOLOGY AND HUMAN VALUES 73, 74 (Summer 1985).

[7] Ian M. Kriegsman, *The Dance Dilemma: Taking Stock at a Meeting of Moguls*, Washington Post, July 17, 1983, L1 (corporations "don't have a peer review panel system for determining what dance to support—it's unique to NEA") (quoting Mr. Richard LeBlond).

As it has evolved in the United States, peer review is intended to ensure that public funds are awarded to the most meritorious scientific and artistic projects in a way that renders the system accountable to the public and its elected representatives. And herein lies the potential for considerable tension. As long-time observers Chubin and Hackett note:

> [P]eer review is expected to operate according to values of fairness and expediency yet its product is to be trustworthy, high-quality, innovative knowledge. There is no assurance that the process will yield the product; to the contrary, the process may interfere with efforts to secure the product.[9]

B. Bias in Decisionmaking

Perhaps the most important goal of the peer review process is objectivity. Governmental allocation of monies to fund projects in the arts and sciences is built upon the assumption that objective criteria for excellence can be articulated and applied in a way that is capable of identifying meritorious proposals and of selecting the best from among those. To the extent that bias infects the decisionmaking process, it loses its objectivity and, consequently, its legitimacy.

The word "bias" takes on different meanings in different contexts. For example, in Administrative Law the courts consider a decisionmaker biased when he or she has an "irrevocably closed" mind with respect to the facts.[10] In the context of peer review, however, the concept comes closer to the dictionary definition of "a highly personal and unreasoned distortion of judgment."[11] A biased decisionmaker does not decide questions on their merits, but rather allows irrelevant personal considerations to intrude systematically into the decisionmaking process. Decisionmaking bias in the award of discretionary grants can result from favoritism, animus, or conflict of interest. The first two stem from the identity of the potential grantee; the latter has more to do with the characteristics and position of the decisionmaker. Bias can also reflect "tunnel vision," or the systematic refusal to give sufficient weight to particular criteria that are supposed to be relevant to the decision. Finally, ex parte lobbying and political pressure can cause an otherwise objective process to become biased for or against particular persons or approaches.

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[8] Joseph McLellan, *NEA: "The First Twenty Years,"* Washington Post, Sept. 16, 1985, D1 (peer review "seem[s] to have generated considerable respect for the NEA among American artists, who feel they are being evaluated not by bureaucrats but by fellow artists.")

[9] Chubin & Hackett, *supra* note 3, at 3.

[10] Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 701 (1948). *See* 3 Kenneth C. Davis, Administrative Law Treatise 372, §§19:2, 19:4; 19:7 (2ed. 1980).

[11] Webster's Ninth New Collegiate Dictionary (1988).

1. Animus

Animus is the ugliest aspect of bias. A governmental assistance program is affected by animus if an applicant's prospect of receiving a grant are adversely affected by some characteristic of that person unrelated to the articulated criteria. Another word for animus in this context is "blackballing." The animus may result from any one of a number of causes, ranging from personal dislike to philosophical differences to racial bias. Animus can stem from personal dislike of an individual, or it can display a general lack of regard for "mavericks" who challenge conventional norms. It may be manifested in many ways, ranging from introducing factually inaccurate information into the decisionmaking process to ranking the applicant at the bottom of the list.

2. Tunnel Vision

Objectivity is also lost when the process becomes afflicted with "tunnel vision," a malady that obstructs the ability of highly trained professionals to view proposals from different perspectives. The problem is not so much invidious discrimination as it is the inability or unwillingness to see the relevance of entire categories of proposals. The tendency becomes a disadvantage when it operates to exclude otherwise qualified proposals that come within the statutorily or administratively drawn bounds of the program. A process that screens out irrelevant proposals is not biased; a process that excludes relevant proposals because the decisionmakers have an unduly narrow professional view of the domain of relevance may be biased.

3. Favoritism

Favoritism is probably much more prevalent than animus in the peer review system. A decision is affected by favoritism when one or more of the applicants in the applicant pool obtains favorable treatment for reasons that are not relevant to the statutory or administrative criteria. The favoritism may manifest itself in many ways, ranging from unmerited high ranking to explicit singling out of an individual for the grant award. Nepotism is one form of favoritism; cronyism is another. The former is almost nonexistent in science, but the latter may play a role in peer review granting agencies. Favoritism is not necessarily limited to peer reviewers. The agency staff can also play favorites by selecting reviewers who are inclined to fund some kinds of proposals and not others.[12]

4. Conflict of Interest

A conflict of interest exists when a decisionmaker's judgment is clouded by his or her own personal stake in the outcome of the decisionmaking process. The clearest conflict of interest exists when the decisionmaker will obtain financial gain or suffer monetary loss if the decision goes one way rather than the other. For example, if one of the peer reviewers will share in the proceeds of the grant under review, the reviewer's judgment could be clouded by the prospect of financial gain. A reviewer also faces a conflict of interest if, through a consultantship or other arrangement with a company, the reviewer can convey financially valuable information to the for-profit enterprise with which he or she is affiliated. This familiar form of conflict of interest will be referred to here as "financial conflict of interest."

A less dramatic, though perhaps more prevalent, form of conflict of interest might be characterized as "research conflict of interest." An active researcher is always on the lookout for new ideas that have not been tried, previously undiscovered approaches that have succeeded, and novel approaches that have failed but have future potential. Even if a reviewer does not directly appropriate an idea from a grant application, much can be learned from the review process that is not available in the published literature. Knowledge gained during the review process may steer a reviewer away from a line of inquiry that has proved fruitless for other researchers (and therefore not published in the literature), or it may trigger an idea that, given sufficient time, would have become apparent to the applicant.

Conversely, a reviewer who has established himself in one field of inquiry may tend to discourage the development of alternative lines of inquiry that may pose a threat to the reviewer's prominence. By simply downgrading a competitor's proposal, a reviewer can simultaneously reduce the competitor's probability for success and enhance the probability that the reviewer's research will continue to receive support. This can be especially troubling when the scientific field at issue is in the process of a "paradigm shift" in which younger scientists question the power of the old paradigm to explain new phenomena, seek out different formulations of the critical questions, and advance alternative theories to explain observations.[13] If the granting agency review panels are filled with devotees of the old paradigm, the development of such new paradigms might be impeded.

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[12] Roy, Funding Science, *supra* note 6, at 73-81. (Peer review "is susceptible to manipulation by managers who operate under the emotional cover of the 'peer review' rubric so that individual proposals may be favored or disfavored simply by appropriate selection of the reviewers.").

[13] *See* T. S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

5. Lobbying and Political Pressure

In legislative decisionmaking bodies the most common vehicle for persuading the decisionmaking entity to send resources in one direction or another is the lobbyist. In the lobbying paradigm, the potential recipient of the funds or a paid representative of the potential recipient attempts to make as many contacts as possible with persons in a position to determine the outcome of the process and to persuade those persons of the wisdom of appropriating resources to that supplicant. There is a long American tradition of bringing political pressure to bear on decisionmakers in the bureaucracies. In the context of discretionary grants, prospective grantees can attempt to persuade influential higher-ups in the Administration or important congresspersons to "go to bat" for their proposals.

Although the lobbyist is a well-respected participant in the legislative appropriations process, the legislative model does not necessarily lead to the most objective results. Rather than awarding grants on the merits of the applications, the process appears to favor insiders and influence-peddlers. A decisionmaking process in which the results depend upon political access and subtle promises and threats is not likely to value objectivity very highly. It could yield the impression that the results are biased in favor of the politically well-connected, and in the extreme could give rise to charges of partisan favoritism.

C. Organization of this Report

The next four parts of this report examine several discretionary grants programs in four granting agencies: the National Institutes of Health (NIH); the National Science Foundation (NSF); the Environmental Protection Agency (EPA); and the National Endowment for the Arts (NEA). The facts and analysis contained therein are drawn from an extensive literature on peer review in NIH and NSF and a growing literature on the NEA grants process. More importantly, the description draws upon extensive interviews conducted with agency officials and in some cases successful and rejected applicants. All interviewees were assured that their responses would be kept confidential. Several graciously consented to allow their interviews to be cited for attribution; most did not want their names associated with the report in any way. In all cases the interviewees' wishes were honored. Candor was far more important to the author than the ability to attribute a factual statement to a particular source.

Although all of these agencies rely heavily upon the principal of peer review in awarding discretionary grants, there are numerous variations across the agencies in how they manage the peer review process. None of the programs has completely eliminated the potential for bias, but some have made great strides in that direction. Each can learn lessons from the others, and the many granting agencies not covered here can learn a great deal from their combined experience.

After describing the peer review process in four real-world contexts, Part 6 of the report will analyze in detail the potential for bias in peer review systems and examine the damage that the potential for bias can do to the integrity of the process. Finally, Part 7 will identify and analyze several possible solutions to the bias problem in the peer review system, ranging from the radical suggestion that peer review be abandoned in some contexts to relatively minor "patch and repair" solutions to problems that have arisen in some programs. The report concludes that peer review is a very effective tool for ensuring objectivity in awarding grants in professional contexts. For the most part, favoritism, animus, tunnel vision, conflict of interest, lobbying and political pressures do not play large roles in existing peer review systems. While this is a comforting conclusion, some improvements can be made and some changes are in order.

II. Peer Review in the National Institutes of Health

The National Institutes of Health (NIH) is a collection of research institutions in the Public Health Service of the Department of Health and Human Services.[14] One of the premier research institutions in the World, it provides almost $7 billion per year to support more than 25,000 separate research awards in health and environmental sciences. In a very real sense, NIH is the father of the biotechnology industry in the United States.[15] NIH is composed of 13 separate institutes, each of which directs its attention to a particular area of health-related research.[16] Much of the research that the NIH sponsors is conducted by federal employees at the flagship campus in Bethesda, Maryland and at several other research centers around the United States. In addition to conducting its own research, NIH sponsors billions of dollars worth of research annually at universities and other public and private research institutions.[17] Virtually all of these outside grants, contracts and interagency agreements are awarded through an intricate process that relies almost exclusively upon peer review for evaluating the quality of grant proposals.

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[14] The National Institutes of Health are established by the Health Research Extension Act of 1985, Pub. L. No. 99-158, 99 Stat. 820 (1985). 42 USC §201 et seq.

[15] Thomas E. Malone, then Deputy Director of NIH, said of NIH's role in the biotechnology industry: "We fathered the industry. We are part and parcel of it." Nell Henderson and Michael Schrage, *Government R & D Funding Spawns a New Industry*, Washington Post, December 16, 1984, A1 col.1.

[16] *See* National Institutes of Health, NIH Data Book - 1989.

[17] NIH has only funded research in for-profit institutions since 1981, and applications from private companies still constitute only a miniscule proportion of the total NIH budget. *See* Henderson and Schrage, *supra* note 15, at A1 col. 1.

A. Discretionary Grant Programs

Because NIH has in recent years suffered from chronic underfunding, many more worthy applications are submitted than can be funded.[18] Therefore, the goal of the discretionary grant programs in NIH is to select the best applications from among a large number of very good applications. The competition among exceedingly qualified researchers for a shrinking pool of resources may itself threaten the integrity of the peer review process. When the stakes are so high, the temptations to cut corners and apply inappropriate criteria may be higher and the need to shield the process from bias correspondingly greater.[19] Although all the Institutes follow the same model for awarding discretionary grants, the following description of the NIH process will attempt to provide a feel for the variety of the grants that NIH funds by focusing particularly upon four very diverse grant programs: (1) the Program for Cancer Cause and Prevention Research of the Division of Cancer Etiology of the National Cancer Institute; (2) the Program for Biological Response to Environmental Health Hazards of the National Institute of Environmental Health Sciences; (3) the General Clinical Research Centers Program in the Division of Research Resources of NIH; and (4) the Biomedical Research Technology Program in the same Division of NIH.

1. The National Cancer Institute

The Program for Cancer Cause and Prevention Research, located in the Division of Cancer Etiology of the National Cancer Institute, awards grants, contracts and cooperative agreements to universities, colleges, hospitals, public agencies, nonprofit research institutions and for-profit organizations for projects designed to identify factors that cause human cancer and to develop mechanisms for preventing cancer. Research programs include studies in epidemiology, chemical and physical carcinogenesis, biological carcinogenesis, nutrition, immunology, and various other field studies and statistical research. The grants and cooperative agreements may be used for personnel, consultant costs, equipment, supplies, travel, patient costs, animals, alterations and renovation, miscellaneous items and indirect costs.[20] The Program allocates about $250,000,000 per year to cancer researchers in 300-400 awards that range from $2500 to more than $6,000,000 per grant.[21] About 25 percent of all applications are funded.[22]

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[18] *See* Kolata, *Beginning Scientists Face a Research Fund Drought*, N.Y. Times, June 5, 1990, C1, col. 2.

[19] *See* Rosenberg, *Medical Research Is In Ruins*, N.Y. Times, Sept. 2, 1990 §4, p. 13, col. 1 (The chronic shortage of funding at NIH "results in such a small fraction of meritorious grants being awarded that it jeopardizes the very objectivity and integrity of the peer review system for evaluating research—a system that depends on a vigorous and varied research community.").

The Program also awards Small Business Innovation Research (SBIR) Grants to small businesses. The objectives of the SBIR awards are: "to stimulate technological innovations; to use small businesses to meet Federal research and development needs; to increase profit sector commercialization of innovations derived from Federal research and development; and to foster and encourage participation by minority and disadvantaged persons in technological innovation."[23] Approximately $800,000 per year is available for a small number of SBIR grants and contracts.

2. The National Institute of Environmental Health Sciences

The National Institute of Environmental Health Sciences (NIEHS), located in Research Triangle Park, North Carolina, is the federal agency with the primary responsibility for conducting and supporting research on the effects of chemical, physical and biological environmental agents on human health. NIEHS attempts to prevent disease through programs that "provide the scientific information base, advanced methodology, and trained manpower to understand and prevent adverse health effects."[24] Although about one-half of its work is done by its own staff,[25] NIEHS supports more than 500 research and training grants that are designed to: "[i]dentify and characterize potentially harmful environmental agents; [l]earn the mechanism of action in biological systems after exposure to hazardous agents; [s]how what effects these agents cause, by themselves and in combination with other environmental factors; [l]earn what diseases are caused or aggravated by environmental factors; and to determine [t]he extent of exposure of various population groups to these agents."[26] The grants are usually substantial and have an average duration of about four years.[27]

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[20] Office of Management and Budget, Catalog of Federal Domestic Assistance 296 (1989). *See* also 42 USC §241; National Cancer Institute, NCI Fact Book 26 (1989).

[21] CFDA at 296.

[22] Telephone interview with Dr. David Longfellow, Branch Chief, Chemical and Physical Carcinogenesis Branch, Division of Cancer Etiology, National Cancer Institute, NIH. September 28, 1990, Friday, 10:00 a.m. and Oct. 3, 1990, 12:00 p.m. (301) 496-5471.

[23] CFDA at 296. The SBIR program is a federal program that cuts across all of the scientific granting agencies. It was established in 1982 by the Small Business Innovation Development Act of 1982. Pub. L. No. 97-219; Pub. L. No. 99-158, 42 USC §285. SBIR Phase I grants (of approximately 6-months' duration) are to establish the technical merit and feasibility of a proposed research effort that may lead to a commercial product or process. Phase II grants are for the continuation of the research initiated in Phase I and which are likely to result in commercial products or processes. Only Phase I awardees are eligible to apply for Phase II support.

[24] Division of Extramural Research and Training, National Institute of Environmental Health Sciences, Grant Support for Investigator Initiated Research Projects (undated manuscript).

[25] Telephone Interview with Dr. Thor Fjellstedt, Deputy Director, Division of Extramural Research and Training, NIEHS, NIH. Thurs. Sept. 27, 1990. (919) 541-7723.

The objectives of the Program are to identify and measure the biological, chemical and physical factors that are hazardous in the human environment as an essential first step in establishing the relationship between different levels of exposure to these factors and possible impacts on public health. The ultimate goal is to obtain a better understanding of the dose-response relationships between toxic substances and human exposures so as to improve public health protection against toxic environmental agents. In addition, the Program aims at developing sensitive techniques for analyzing human exposures to environmental agents and for determining the rates at which such agents enter the body, how they are stored, metabolized and excreted. The Program also seeks to achieve an understanding of how human enzyme systems increase or decrease the toxicity of environmental toxins. Researchers examine how environmental elements affect the liver, lungs, intestines, nervous and immune systems, etc. They also investigate possible carcinogenic, genetic and reproductive effects. Examples of funded projects include a prospective study of diet and cancer in women, a study of the epidemiology of melanoma, a study of cellular and biochemical effects of tumor promoters and experimental tobacco carcinogenesis.[28]

The Program on Biological Response to Environmental Health Hazards has a budget of approximately $30,000,000 with which it supports 150-200 research grants.[29] Grants range from $43,000 to $1,544,000, with a median of $175,800. Like NCI, NIEHS awards grants to universities, colleges, hospitals, public agencies, nonprofit research institutions and for-profit organizations. NIEHS also has a SBIR program similar to that of NCI. Examples of funded grants include molecular mechanisms of organophosphate immunotoxicity, the molecular basis for initiation of DNA repair, and a probable mechanism for the carcinogenicity of 2-nitropropane.

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[26] Division of Extramural Research and Training, National Institute of Environmental Health Sciences, Grant Support for Investigator Initiated Research Projects (undated manuscript).

[27] Telephone Interview with Dr. Thor Fjellstedt, *supra* note 25.

[28] CFDA at 296.

[29] CFDA at 186.

3. The General Clinical Research Centers Program

The Program for General Clinical Research Centers (GCRC) in NIH's National Center for Research Resources provides major funding to construct and maintain research centers within hospitals at academic institutions to host investigators funded by other NIH components, other federal and state agencies and the private sector.[30] The purpose of these grants is to create and sustain specialized institutional resources in which clinical investigators can observe and study human physiology and disease. Centers operate as "discrete, multi-departmental, multi-categorical research inpatient and outpatient units." They are intended to be "institutional resources where scientists from many departments correlate their laboratory studies with carefully controlled clinical investigations and analyses."[31] When the number of researchers at an institution receiving outside funding (often from NIH) reaches a "critical mass," high level administrators can prepare a proposal for GCRC funding. In the words of one investigator, the centers are like a "holding company" for a group of principal investigators at an institution. A GCRC award lends prestige to an institution and can help it in recruiting new researchers. Grants can be used to pay the cost of "renovation of facilities, equipment, hospitalization, core laboratories, salaries of center directors, biostatisticians, nurses and technical staff, and other operational costs."[32] At present there are 74 such centers throughout the United States.

The Program awards approximately $120 million in grants to the 74 grantee institutions and several other entities. The grants range from $300,000 to $4 million annually, and average around $1.6 million. A small SBIR program awards one or two grants per year. Phase I SBIR grants run about $50,000, and Phase II grants can be as large as $3 million. General Clinical Research Centers typically support multiple projects from many disciplines, including internal medicine, pediatrics, surgery and obstetrics and gynecology. Projects address all aspects of disease mechanisms and may range from studies of nutrition and growth and development to genetics and immunology. One typical SBIR project supported the development of computer software for handling clinical research data.[33] The vast majority of the centers are refunded each year, but one or two centers typically drop out or are not refunded. Although one might predict that the competition would be quite stiff for the two or three available grants, in fact the agency receives only one to three applications for new centers per year.[34]

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[30] *See* 42 USC §287 et seq.

[31] Although grant awards may be made to for-profit institutions, the grants are not intended to support the routine development of products for sale. For example, it is not proper for a for-profit drug company to use a GCRC funded Center for safety and efficacy testing of drugs as part of the application process for drug approval at the Food and Drug Administration without paying the center for the resources used in the project. On the other hand, if a scientist associated with a Center desires to test a new idea that he has developed about the mechanism of the drug, use of the Center's resources would be appropriate.

[32] CFDA at 282.

[33] CFDA at 283.

4. The Biomedical Research Technology Program

The Biomedical Research Technology Program is another program in the National Center for Research Resources of NIH. The program awards grants to assist academic, nonprofit and for-profit institutions in developing and sustaining the kind of sophisticated technological capabilities that are vital to modern biomedical research. These grants provide biomedical investigators with exceedingly expensive and sophisticated tools for research, education and patient care, such as facilities for computing and data processing, high-voltage electron microscopy, mass spectroscopy, nuclear magnetic resonance spectroscopy and other specialized instrumentation. The program's focus on technology, rather than pure research, makes this program somewhat unique in NIH. Special emphasis is given to large scale multidisciplinary projects of regional and national scope. The grants, which may be awarded to institutions of higher education, hospitals and other institutions and other organizations with programs of biomedical research and specialized research services, provide funds for primary equipment, professional staff and related operating expenses. Smaller awards are available to provide support for pilot projects to demonstrate feasibility of innovative ideas in the fields of high technology and engineering.[35] A small number of SBIR grants are also available.

The Program's annual budget of about $40 million is used to fund 55 biomedical research centers, 10-20 resource-related research grants, 10-20 other small grants, and 10-20 SBIR awards.[36] Grants range from $16,897-$2,192,567, and average $573,587.[37] Average Phase I SBIR awards are for approximately $50,000, and Phase II awards may range up to $500,000.[38] The program is very competitive. Less than 40 percent of large grant applications are funded, and only about 25 percent of small grant applications receive awards.[39] Examples of funded projects include biomedical computer centers, biological structure research, biomedical engineering and biomedical and biophysical analyses.

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[34] Telephone interview with Dr. Bernard Talbot, Program for General Clinical Research Centers, National Center for Research Resources, NIH, September 26, 1990. So few institutions apply for funding each year because of the agency's tradition of continuing funding for existing grantees and because of the expense of preparing an extensive application for a large center.

[35] CFDA at 291.

[36] CFDA at 292; CFDA update at E-55.

[37] A $650,000 per year limit is now in effect except where exceptional justifications can be made. CFDR at 292.

[38] CFDA at 292.

[39] CFDA at 292.

Examples of funded SBIR projects include research aimed at producing interactive instructional videodiscs and developing fiber optic sensors.[40]

B. Criteria for Awarding Grants

NIH can award individual research grants to any nonprofit or for-profit organization, company or institution engaged in biomedical research. The usual beneficiaries are universities and nonprofit research institutions. Applicants for GCRC grants must be medical schools, research hospitals or similar institutions. SBIR grants can only be awarded to domestic small businesses.[41] The broad criteria for awarding grants are the same for all the Institutes. The major elements in evaluating proposals include assessments of: (1) the scientific merit and general significance of the proposed study and its objectives; (2) the technical adequacy of the experimental design and approach; (3) the competency of the proposed investigator or group to successfully pursue a project; (4) the adequacy of the available and proposed facilities and resources; (5) the necessity of the budget and components requested in relation to the proposed project; and (6) the relevance and importance to announced program objectives.[42] Although the criteria for awarding General Clinical Research Center grants vary somewhat because of the focus on funding centers for multiple research efforts,[43] the evaluators tend to apply the above criteria to the research that is to be carried out at the centers in deciding whether to award a grant to the center itself.

C. Procedures for Awarding Grants

NIH must by law "require appropriate technical and scientific peer review of...applications made for grants and cooperative agreements...for biomedical and behavioral research,"[44] and peer review plays an exceedingly important role in determining which projects are funded. Applications for NIH support go through a "dual review" process. A grant application is assigned according to subject matter by NIH referral officers to one of 90 standing peer review groups, usually referred to as "study sections," which are located within the Division of Research Grants.[45]

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[40] CFDA at 292.

[41] Small businesses are entities that are independently owned and operated for profit, are not dominant in the field in which research is proposed, and have no more than 500 employees. The small business entity must constitute the primary employment (more than one-half time) of the principal investigator at the time of award and during the conduct of the proposed project. According to one NCI grant administrator, there are two categories of typical applicants: (1) individuals formerly associated with large institutions who are very familiar with the program (these applicants are usually successful); and (2) others with some training, usually in software development who keep applying and finally, by trial and error, get funded.

[42] CFDA at 283. The primary criteria for evaluating Phase I SBIR grant applications include: (1) the technical merit of the proposed research; (2) the soundness of the proposed design and methods; (3) the qualifications of the proposed principal investigator, supporting staff and consultants; (4) the potential of the proposed research for technological innovation and commercial application; (5) the appropriateness of the budget requested; and (6) the adequacy and suitability of the facilities and research environment. CFDA at 186.

[43] Institutions must demonstrate potential research productivity, quality of the proposed physical facility, and soundness of the administrative plan for the center. CFDA at 282.

The Division of Research Grants, which houses the study committees, is not within any of the individual institutes, and its staff does not report to any of the programs that are responsible for funding and managing the grants. Each study section has a "Scientific Review Administrator" (formerly called "Executive Secretary") from the staff of the Division of Research Grants to provide clerical and ministerial support. Approximately 2700 external reviewers serve four-year terms on NIH study sections.[46] They are paid $150 per day for their efforts plus travel expenses and per diem. Potential peer reviewers are identified through several sources, including the committee's Scientific Review Administrator's knowledge of the field and the scientists who work in it, the Scientific Review Administrator's contacts at scientific meetings, NIH staff recommendations, existing research grant applications and awards, research publications, and recommendations of existing panel members.[47] No study section may have more than one member from the same institution. Although most study section members are appointed for fixed four-year terms, members can be added on an ad hoc basis when additional expertise is needed to evaluate particular proposals. In addition, when no existing study section appears to have the requisite expertise to evaluate a proposal or group of proposals, an ad hoc study section can be appointed for the limited purpose of reviewing a small number of applications.[48] Ad hoc committees are also used to evaluate applications from other study section members. Most SBIR applications are reviewed by ad hoc committees, and the programs make a special effort to locate scientists in industry for membership on these committees.[49]

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[44] Health Research Extension Act of 1985 §492(a)(1)(A). 42 USC §289a.

[45] United States General Accounting Office, University Funding: Information on the Role of Peer Review at NSF and NIH 14 (March 1987), at 15 [hereinafter cited as 1987 GAO Report]. The National Cancer Institute and the National Institute of Neurological and Communicative Disorders and Stroke in 1985 initiated grant programs designed to take special account of the applicants' track records in making longer-term awards. These special programs have relied on mail reviews similar to those typically used in NSF. *See* Culliton, *NIH Proposes Extending Life of Grants*, 226 SCIENCE 1400 (1984).

[46] 1987 GAO Report, *supra* note 45, at 15.

[47] *Id.* at App. IV.

[48] Some programs make more extensive use of ad hoc study sections than others. For example, most applications in the Biomedical Technology Program are reviewed by ad hoc committees, although there are a few permanent study sections.

[49] In this regard, NIH differs from NSF, which declines to place scientists from industry on SBIR review committees because of the potential for conflict of interest.

Each study section typically holds three annual meetings[50] at which the reviewers collectively apply the program's previously articulated selection criteria to the grant applications assigned to the section. When no member of the panel has sufficient expertise to evaluate all aspects of a proposal, one or more external written reviews may be requested to aid the panel.[51] The application and any outside reviews are assigned to two or more panel members (called the primary and secondary reviewers) who prepare detailed written reviews prior to the panel meeting at which the application is discussed. All panel members are expected to read all of the applications.[52] Study sections in programs, like the General Clinical Research Center and Biomedical Research Technology programs, that fund large capital projects, conduct site visits to the institutions that house the projects at least one time per grant cycle. There are usually about 15 visitors, nearly all of which are from academia. Applicants in these programs are given the opportunity to specify particular scientists that they prefer not be on the panel conducting the site visit.[53]

The study section's evaluation of each application is typically broken down into two separate steps. After hearing from the primary and secondary reviewers and discussing the proposal, the group first decides whether the application is deemed "worthy" of funding based on the NIH selection criteria. Approximately 90 percent of the applications pass this preliminary test.[54] If an application is deemed worthy, the study section next assigns it a priority rating from which the NIH staff computes a priority score. A "summary statement," which is prepared by the Scientific Review Administrator from the two premeeting written reviews and his or her notes of the meeting, relates the application's score and articulates the group's reasons for assigning it that score.[55] The application files are then sent to the Program Directors for the relevant programs in the Institutes. Only the summary statement accompanies the application to the next stage of the review process—review by the Advisory Council for that Institute.[56]

Each Institute has an Advisory Council composed of scientists and lay persons appointed by the Secretary of Health and Human Services or, in some cases, by the President. Membership on some Advisory Councils is regarded as a political plum; for example, the lay members of the National Cancer Advisory Board (the Advisory Council for NCI) are usually prominent supporters of the party in power that have an active interest in cancer.[57] In addition to providing broad advice on how the Institute should allocate funds among programs, the Advisory Councils review the summary statements, and recommendations of the study sections for scientific merit and for consistency with nontechnical programmatic goals.[58]

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[50] Study section meetings are usually held at hotels near the NIH campus or at the locations of important scientific meetings.

[51] NIH Manual 4510, "Referral and Initial Review of NIH Grant and Cooperative Agreement Applications 9 (July 1, 1982).

[52] *Id.*, at 9.

[53] Telephone Interview with Dr. Bernard Talbot, *supra* note 34.

[54] Chubin & Hackett, *supra* note 3.

[55] The summary statement, "while not necessarily exhaustive, should be complete and represent a group evaluation of each application." It must contain "objective factual information, carefully documented and well justified." It must also include "pertinent material from the meeting discussions." NIH Manual 4510, *supra* note 51, at 13.

[56] *See* NIH Manual 4510, *supra* note 51, at 9; Chubin & Hackett, *supra* note 3, at 20-21; 1987 GAO Report, *supra* note 45, at 11-13.

Although it would probably not be accurate to describe Advisory Council review as perfunctory, the Councils are highly deferential to the study section recommendations.[59] Only about 10 percent of the applications are singled out for review by the Advisory Councils, and a much smaller proportion result in any special action by the Councils.[60] The Councils almost never involve themselves in minor adjustments to the budget, and they tend to avoid detailed involvement in the nitty-gritty of detailed scientific evaluation. Their purpose is to evaluate the overall output of the study section meetings, not to second guess the study sections on individual applications. If a Council is dissatisfied with a study section's output, it can remand one or more matters to the study section for reconsideration. This limited Advisory Council involvement is, in any event, an inevitable consequence of the program's workload. For example, in the National Cancer Institute, the agency staff mail about 1400-1500 summary statements out to Advisory Committee members 2-3 weeks before the triennial meetings. Even the most conscientious Council member cannot realistically examine all of the evaluations in detail prior to the meetings.

From the Advisory Councils' comments, the applications, and accompanying summary statements, the Institute's Program Director ranks the "fundable" applications. Because scientific merit is not the only criterion, the staff is permitted to depart from the ranking suggested by the study sections and approved by the Advisory Councils. Yet this happens only extremely rarely (less than three percent of the time),[61] because it requires the Program Director to draft a special petition and pursue the matter through the Institute's hierarchy. Some, but not all, Program Directors typically set aside some funds to allow the directors the discretion to fund the projects that fall very close to the cutoff line, a process that is referred to internally as "funding by exception."[62]

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[57] Past members of the National Cancer Advisory Board include Ann Landers, Richard Block of H & R Block, and former United States Senator Tim Lee Carter.

[58] The Secretary chooses Advisory Council members from among nominees from NIH, members of Congress, special interest groups, other entities within HHS and the general public. 1987 GAO Report, *supra* note 45, at 16. For example, the Advisory Council for the General Clinical Research Center Program has 18 members. Six are public members who are individuals with other expertise in law, economics, math, and public policy. Twelve are scientists selected on the basis of scientific expertise. All are appointed by HHS headquarters.

[59] Chubin and Hackett conclude that: "The NIH awards process is hardly one of "dual review" for the second stage rarely considers the merits of individual proposals (or, if it does so its consideration makes essentially no difference in the final rankings)." Chubin & Hackett, *supra* note 3.

[60] 1987 GAO Report, *supra* note 45, at 13; Chubin & Hackett, *supra* note 3, at 22.

[61] 1987 GAO Report, *supra* note 45, at 13.

NIH has always interpreted the Privacy Act to require that its peer review files for individual grant applications be made available for examination and correction by the applicants but otherwise shielded from public disclosure. Portions of panel and Advisory Committee meetings that discuss the merits of individual proposals are also closed to the public.[63] Panelists are instructed that all materials related to the review of grant applications are strictly confidential, and no written materials may be removed from the conference room. Reviewers may not share with applicants or their institutions the content of the panel deliberations.[64] No particular sanctions are specified, however, for breaches of confidentiality. In practice, the only sanction is the stigma that accompanies removal from the panel.

NIH makes grant applications for funded projects and a general description of the awards available to the public after each funding round has been completed. Interim and final progress reports and the results of any audits or reviews of the grant are also routinely made public. Pending or disapproved applications for new grants, memoranda and transcripts from panel meetings, and other written communications from reviewers are not automatically made public, but information contained therein may be released upon a request pursuant to the Freedom of Information Act (FOIA).[65] Although the D.C. Circuit Court of Appeals held in *Washington Research Project, Inc. v. Dept. of Health, Education and Welfare*[66] that the contents of *all* grant applications were generally releasable under FOIA at the end of the funding cycle, NIH has recently taken a very broad view of the applicability of exemption 4 of that statute to information contained in grant files. Exemption 4 allows agencies to withhold information that would disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[67] NIH believes that, given the recent trend toward commercialization of government-sponsored research, a good case can usually be made for withholding much of the contents of a grant application under this exemption. The validity of this argument has yet to be tested in the courts.[68] NIH further takes the position that information contained in summary sheets (including priority scores), transcripts and summaries of peer review meetings and outside reviews that constitutes opinion, rather than purely factual information, comes within exemption 5 of FOIA, which applies to internal agency communications.[69]

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[62] Telephone interview with Dr. Iris Obrams, Branch Chief for Extramural Programs, Epidemiology and Biostatistics Division, NIH, Friday, November 2, 1990.

[63] NIH Manual 4513 (1982), at 2.

[64] NIH Manual 4510, *supra* note 51, at 7.

[65] United States Public Health Service, PHS Grants Policy Statement 15 (1987).

[66] 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975).

[67] 5 USC §552(b)(4).

The printed forms for initial applications inform all potential applicants of their Privacy Act rights. Pursuant to that statute, NIH routinely provides all applicants with staff-prepared summaries of both written reviews and panel minutes (with priority scores attached) after the completion of the panel review process and prior to submittal of the application to the relevant Advisory Council.[70] NIH regards this as an important source of feedback for future applications and resubmittals of declined applications.[71] If an applicant requests copies of the actual reviews (called pink sheets because of their historical color) and minutes, they are sent with certain information (e.g., the identities of the reviewers and panelists) redacted.[72] Transcripts of panel meetings and the actual minutes of the meetings are not made available. For the most part, applicants seem willing to trust the staff summaries and do not request original documents.[73] The applicants have an opportunity to rebut the conclusions reached by the study sections in submissions to the Advisory Councils, but these result in changes only rarely and only in cases of factual errors critical to the decision.[74] Applicants are informed of the identities of peer review group members on their pink sheets, but the identities of the panelists who wrote the primary and secondary written reports to the study section and the identities of the authors are not made available to the Program Directors or the applicants, and their written and oral comments are not otherwise revealed to applicants or the public.[75]

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[68] The argument has a surface implausibility. If the applicants are willing to have the information in grant applications viewed by peer reviewers, some of whom may be direct competitors, it is hard to see how it could seriously be maintained that the information is "trade secret." *See* generally McGarity and Shapiro, The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies, 93 HARV. L. REV. 837 (1980).

[69] 5 USC §552(b)(5) (exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency").

[70] NIH Manual 4512 (1982) as superseded by NIH Instruction and Information Memorandum OERT 83-4, December 21, 1984. *See* also Memorandum to Distributees from Associate Director for Extramural Research and Training, NIH, dated August 24, 1978 re: Routine Release of Summary Statements following National Advisory Councils and Boards. When the Advisory Council takes a position different from that recommended by the review panel, the package to the applicant must include a letter indicating the Council's decision and a supporting rationale. *Id.*

[71] NIH Manual 4512 (1982), at 4.

[72] United States General Accounting Office, Peer Review: Compliance With the Privacy Act and Federal Advisory Committee Act 7 (1991) [hereinafter cited as 1991 GAO Report].

[73] *Id.*, at 7. NIH receives fewer than 10 Privacy Act requests per year. *Id.*

[74] For example, reviewers of a recent application were favorably impressed by the project, but were concerned that the principal investigator had conducted research for four years without a single publication resulting. After the committee recommended that the grant not be funded, the applicant wrote a rebuttal letter explaining that he had been in medical school during the relevant time period and had actually conducted research only in the summers. The application was later funded.

Each potential reviewer must fill out a financial disclosure statement that reveals the extent of that person's financial interests in various institutions and companies. NIH conflict of interest regulations and guidelines prevent a panel on which a reviewer sits from considering the reviewer's application or an application from the reviewer's "spouse, parent, child, partner, or close professional associate." In addition, a panelist must leave the meeting when the panel is considering an application from his or her own organization or an organization with which he or she is negotiating for future employment.[76] The guidelines urge all reviewers to avoid the "appearance" of a conflict of interest by refraining from participating in the evaluation of applications involving a recent student, a recent teacher or a close personal friend. Finally, reviewers "should not participate in the review of an application from a scientist with whom the reviewer has had long-standing differences which could reasonably be viewed as affecting objectivity."[77] The Director of NIH may waive these guidelines and prohibitions "if he or she determines that there is no other practical means for securing appropriate expert advice on a particular grant application...."[78] Except for a terse, but foreboding reference to "relevant provisions of Title 18 of the United States Code, relating to criminal activity," the regulations and guidelines do not provide any sanctions for breach of their provisions.[79]

Applicants have a limited right to request reconsideration of panel determinations prior to consideration by the Advisory Councils.[80] Staff-prepared review summaries (the pink sheets), with priority scores attached, are sent to all applicants after the panel meetings. Pursuant to the Privacy Act, applicants may demand that the agency correct any information that is not accurate, relevant, complete or timely prior to submitting the applications to the Advisory Council. The rejected applicant first consults with the Program Director in charge of the application who refers any written rebuttals to the primary and secondary reviewers to correct any factual errors in their evaluations of the proposal. Obvious factual errors can be corrected before the group of applications goes to the Advisory Council. Rejected applicants may also argue that the study section did not contain any scientist with sufficient expertise in the relevant scientific field. NIH takes the position, however, that "[m]atters of expert opinion are not subject to amendment" in light of Privacy Act responses.

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[75] NIH Manual 4514 (1982), at 6.

[76] 42 CFR §52h.5(b). *See also* NIH Manual 1805 at 6-7 (1982).

[77] NIH Manual 4510, *supra* note 51, at 7; NIH Manual 1805 at 6-7.

[78] 42 CFR §52h.5(c) (1990).

[79] 42 CFR §52h.5(a) (1991).

[80] Applicants must follow formal rebuttal procedures. They are not allowed to communicate with Council members concerning funding matters. Council members are provided a standard form to fill out if applicants ever attempt to communicate with them about funding matters. This sort of contact almost never happens in NIH.

When the Program Director is persuaded that the study section made a mistake on a matter of opinion, such as the overall importance of the project, the staffer will urge the applicant to resubmit the application to a different study section or request a referral officer in Division of Research Grants to appoint an ad hoc study section, rather than continue to resubmit to the same committee. If the staffer is not convinced that a mistake was made but thinks that the project deserves funding, he or she will usually advise the rejected applicant on ways that the application can be improved for submission in a future funding cycle. For example, the staffer might suggest a collaborator whose inclusion in the project might enhance its chances for funding in the future.

The staff makes the Advisory Councils aware of any rebuttals that applicants file. Rebuttal letters can have an impact on the Council's rankings in cases of miscalculations or misinterpretations of a researcher's qualifications, but the Councils do not normally pay attention to differences of scientific opinion. Unless requested in advance, the Advisory Councils only have the summary statements before them, and they are disinclined to second guess the experts who have spent more time evaluating the merits of the proposals. Most of the scientist members on the Advisory Councils were previously members of study sections, and they know that too many reversals could have an impact on the willingness of study section members to serve in the future.

After the relevant Advisory Council has completed its review of the proposals, mid-level NIH staffers (usually Branch Chiefs) ascertain from the agency's budget office the rough percentage of proposals that may be funded and meet together to draft final recommendations to the Institute's Director. At these meetings, the Branch Chiefs can compete with one another for additional funding "by exception" from the previously mentioned pool of funds set aside at the outset. The Branch Chiefs can change the ranking of proposals at the margins. The goal of these meetings is to look at the broad picture and present the Director with a recommendation that is defensible to the outside world, which includes rejected applicants and sometimes interested congresspersons. The final decisions are usually made by executive committees composed of the Institute's Director and the directors of the various divisions within the Institute.

NIH has promulgated procedures for challenging initial review recommendations. The agency recognizes that applicants may appeal decisions not to fund for several reasons, including "perceived insufficient expertise on the initial review group…or conflict of interest on the part of one or more of its members; apparent factual or scientific errors, oversights, or bias associated with the review of an application at the initial or advisory council review; and possibly inappropriate handling of the review or of the application."[81] The appeals process, however, "is not intended to resolve purely scientific disputes between peer reviewers and the investigator; to provide a mechanism for allowing investigators to submit information that should have been presented in the original proposal; or to provide a forum for disputing priority score determinations in the absence of specific and substantive evidence pointing to a flawed review."[82] In practice, appeals are usually only taken in cases of terminations of ongoing grants. Appeals must be taken to the Review Officer in the Office of the Director, but initial review panels and Advisory Councils will usually be asked to participate in the resolution of the appeal. Actions that may be taken in the case of valid appeals include "rereview by the same or another initial review group; special consideration by the advisory council; or administrative action authorized by the Institute Director or staff."[83] There is no procedure for appealing final funding decisions.

D. The Process in Operation

The peer review process at NIH is often held out as a model of how peer review ought to be carried out in awarding discretionary grants. Yet although the NIH peer review process is generally highly successful, problems occasionally arise. The following discussion addresses some of the issues that NIH staffers, applicants, reviewers and outside commentators have identified. While the following discussion necessarily tends to focus on criticisms of the programs, support for the NIH peer review system as a whole is both broad and deep among those who deal with it on a regular basis.

1. Feedback and Rebuttal

Unlike some research granting institutions, NIH provides applicants with a statement of reasons in the form of a pink copy of the evaluation of the peer review committee. This can be especially useful to researchers who are not funded, because researchers can use the pink sheets to identify improvements that can be made in future applications. Applicants cannot, however, gain access to the actual minutes or transcripts of the panel meetings. Indeed, the pink sheets have been sanitized to a limited extent by the Program Directors who typically return to the Scientific Review Administrators any summary statements containing derogatory statements and obvious factual errors. Even after sanitization, the pink sheets can sometimes reveal indications of bias among one or more members of the panel.

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[81] NIH Instruction and Information Memorandum OERT 85-2, dated March 19, 1985; see also NIH Guide for Grants and Contracts, Vol. 14, No. 4, March 29, 1985.

[82] NIH Instruction and Information Memorandum OERT 85-2, *supra* note 81; see also NIH Guide for Grants and Contracts, *supra* note 81.

[83] NIH Instruction and Information Memorandum, *supra* note 81.

Rejected applicants can take the pink sheets to the Program Directors and explore the possibility of preparing a grant application for a different program where it will have a higher probability of success. If the Program Director is persuaded, he or she will "lobby" the staff of the Division of Research Grants to assign the next proposal to a different study section. Most of the researchers interviewed for this report were of the opinion that the agency staff was very helpful in explaining why applications were rejected and in making suggestions for improvement or for sending proposals to different study sections.[84] On the other hand, there is a sense among some applicants that the explanations that the peer reviewers provide are post hoc rationalizations. Sometimes rejected applicants perceive that the real reasons for poor reviews are not provided on the pink sheets and may in fact be relatively trivial. One applicant interviewed for this report was persuaded that the comments on his pink sheet were designed to steer his research in more conventional directions that the committee believed were more consistent with their own research perspectives.

Ironically, because it is willing to share summary statements with the applicants, NIH invites challenges based upon factual inaccuracies that inevitably creep into the written reviews. An applicant justifiably feels unfairly treated when the Institute's explanation contains factual errors, even if the project probably would not have been funded in the absence of the errors. NIH provides applicants an opportunity to cure any errors on the pink sheets prior to submission to the Advisory Councils, but given the limited substantive role that the Advisory Councils play, it is highly unlikely that rebuttals will affect the rankings at that level. One researcher interviewed for this project suggested that applicants be given an opportunity to correct obvious errors on the pink sheets before the peer review sections make their final recommendations. This would not necessarily require an additional meeting of the study section. Like motions for rehearing in court, the rebuttals could be circulated to members of the study sections by mail. If more than a predetermined number of the study section members voted to rerank the applications in light of the rebuttal, this could be accomplished via a conference telephone call.

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[84] One researcher related that after his first application was not funded, he called the scientific review administrator for the committee that reviewed his application, and they went over the pink sheet on the telephone. The scientific review administrator also read the minutes of the study section meeting and told the researcher that the panelists were interested in funding the proposal if some improvements were made. He resubmitted the proposal in the next funding cycle, and it was funded. As a result of this experience the researcher learned to ask NIH staffers: "Was the proposal appropriate? Did it go to the right committee? Were they interested?" Telephone interview with Dr. Raymond Novak, Director of Institute of Chemistry & Toxicology and Professor of Pharmacology, School of Medicine, Wayne State University, March 3, 1991 - 4:35 p.m., 313-577-0100.

NIH staffers argue that much the same result is accomplished through the informal process that has evolved whereby a disappointed applicant may submit a written rebuttal to the Program Director for presentation to the Advisory Council. Even though the Advisory Council will not likely change the priority scores, it can note its opinion that a mistake was made, and the Program Director can cite that fact at the Branch Chief level in arguing that the proposal should be funded by exception. NIH staffers further observed that even if rejected applicants are only given a relatively brief period in which to submit rebuttals, the process could easily become bogged down if a significant percentage of the more than 30,000 annual applicants exercised a rebuttal right.

2. Favoritism

The NIH staffers interviewed for this report were generally confident that scientists could put aside personal friendships and vote on the merits of the applications before them. Nevertheless, NIH attempts to avoid even the appearance of personal favoritism by excluding from study sections applicants, family of applicants, and their co-workers both at their institutions and at other institutions. In addition, although NIH's conflict of interest regulations allow a person to sit on a panel that considers applications from the panelist's institution, the panelist must leave the meeting when the panel is considering an application from his or her own organization or an organization with which he or she is negotiating for future employment. Unlike a similar provision in the National Endowment for the Arts' regulations,[85] this aspect of the NIH conflict of interest regulations has been relatively uncontroversial.

3. Old Boy Network

Like virtually all peer review-based granting organizations, rejected applicants frequently characterize the NIH process as an "old boy" network in which those who are already in the process dominate the peer review panels and parcel out the awards among themselves. For example, when one frequently funded researcher decided to shift his research interests to a slightly different area, he was told by friends high up in NIH that the field in which he proposed to conduct research was a "club" and he was not a member of the club. They subtly suggested to him that he would enhance his chances of receiving a grant in the new field if he hired a member of the club as a consultant on his project.[86] Another suggested technique is to offer to make a member of the committee

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[85] *See* Part 5, *infra*.

[86] One NIH staffer suggested that recommendations that established applicants find collaborators when they desire to enter new fields is less a matter of "old boyism" than a fear that the proposal will otherwise lack sufficient expertise.

(preferably the chairman) a co-author of a paper as an introduction into the old boy network.[87] Still another technique for new researchers is to circulate drafts of the grant proposal to prominent scientists in the field who are likely to be members of the study sections for comments prior to submitting the proposal to NIH. The recipients will feel flattered that their advice was requested, and they will obtain a familiarity with the subject matter of the proposed research quite apart from their status as members of the panel.[88]

While recognizing the fact that it is often hard for a young or inexperienced researcher to break into the system by securing an initial grant, one NIH staffer attributed this to the novice's general lack of familiarity with the procedures and with the evaluative criteria, rather than to any favoritism for the members of the "club." The staffer also noted that NIH committees already contain a fairly large number of Assistant Professors with little prior experience with the NIH grants process, thus reducing the chance that a given committee will be dominated by an "old boy" faction. Finally, NIH staffers observe that many established scientists do not get funded and many newcomers do get funded.

4. Halo Effect

Closely related to the "old boy network" problem is the "halo effect" through which a well-established researcher is funded for projects that are not especially well designed or that are not in a priority area merely because of the principal investigator's reputation as a pillar of the relevant field. NIH staffers generally believe that, like seeding in professional tennis, a scientist should be evaluated on the basis of his or her recent performance, not on the basis of past reputation. But they all recognize that scientists who are regarded as the leaders in their fields get "special consideration" unrelated to the merits of their proposals. One staffer related an experience in which a very prominent investigator submitted an application for a continuation of an existing grant that reflected major modifications in the identity of the researchers and in the project's scope with little explanation for the changes. The Program Director was upset by the investigator's implicit assumption that he had an entitlement to funding, and he arranged a meeting with the investigator to "sort of haul him over the coals." Before the meeting, the investigator won a Nobel prize "and let me tell you, the meeting was immediately canceled." Another staffer noted that it is very difficult to refuse funding to a scientist who has won a Nobel prize, even when his applications are "kooky" and everyone involved recognizes that he is past his prime.

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[87] According to NIH staffers, this strategy would be of only limited utility, because co-authors are not eligible to review the application of a collaborator for a period of time after publication of a co-authored paper.

[88] NIH staffers also questioned this strategy, because the agency's informal rules of practice require a reviewer to excuse himself if he has been asked to review a proposal outside of the formal NIH process.

Although the halo effect may have distorted the process in the past, it is not clear how large a role it plays in the current age of very tight budgets. One interviewee explained that reviewers are increasingly unwilling to keep an old timer afloat with funds that could be spent on more relevant or productive projects. Another suggested that NIH staffers are disappointed when an established scientist submits a poor proposal, and they subtly suggest that the proposal be withdrawn and amended. If a peer review panel knows that an application from a very highly regarded researcher is below par, the panel can limit the duration of the grant as a "slap on the wrist."

5. Personal Animus

When research support monies are in short supply, the animus of a single member of a study section can deprive a good project of support. Since the scores of the panel members are typically averaged together, an especially low score from one panel member can be outcome-determinative. One frequently funded researcher interviewed for this project was convinced that one of his projects failed to obtain funding because the review panel contained a "wild man" who "ranted and raved" about the proposal and gave it a low score. Although panel members are supposed to be anonymous, this researcher found out that the panel member had done some parallel work in the past that had reached results that varied from those of the applicant's recent research. The project was later recommended for funding by a section with a different membership.

The fact that rankings are made in meetings in which as many as 25 scientists are present helps shield against animus on the part of any single committee member. Each participant knows that the other panel members are also experts and will probably detect attempts to grind any axes. One frequent panelist noted that, given the experience of the other members of the committee, it is very difficult credibly to downgrade a worthy proposal.

6. Mavericks

It is difficult in NIH for "mavericks" who advocate unorthodox research proposals to get funded, unless they already have a reputation for success. One NIH staffer observed, with an obvious reference to the work of Thomas Kuhn,[89] that each scientific field has its own "paradigm, world view, or set of coordinates" through which researchers see the universe. Several researchers and members of the NIH staff observed that projects well within the "mainstream" of previously funded research have a much better chance of being funded during any given year than research that rejects the conventional wisdom. In fact, in many programs, most funded research consists simply of incremental extensions of existing research into slightly different areas. One scientist interviewed for this report observed that the existing funding system strongly encourages this sort of cautious incrementalism, which he referred to as "me too" science. The result is "a big fraternity of scientists all reaching the same conclusions and not testing each others' hypotheses."

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[89] Kuhn, *supra* note 13. Kuhn observed that advocates of paradigm shifts in a field are not well received by their peers who adhere to the old paradigm.

When the scientists from the mainstream control the purse strings, it can be difficult for the mavericks to obtain the resources necessary to prove or disprove their out-of-the-ordinary theories. One investigator observed that advocates of new or different approaches face a "Catch 22" in the peer review process, because the reviewers often criticize proposals on the ground that the kind of research outlined in those proposals lacks a sufficient predicate in previously published research. Another researcher complained that although his group had published many papers in peer reviewed journals, it had difficulty getting NIH grants "because the panels are representative of the opposite school of [thought], and it's very threatening for a scientist to see a new idea. It's automatically shot down." Several scientists and agency staffers noted that a decision to fund a maverick proposal is to some extent an admission that the dominant paradigm may be wrong. If the maverick is right, then the case for continued funding of existing grants is weakened.[90]

One investigator interviewed for this report was associated with a prominent cancer research institute, but held to an unorthodox theory for the mechanism of chemical carcinogenesis. His applications to NCI were reviewed by panels composed of adherents to the traditional theories, and they were predictably rejected. Rather than opt out of the federal funding system as many mavericks do, this researcher complained to the Director of NCI and the Director of the Research Grants Division that his projects were being reviewed by biased panelists, and he demanded that his projects be reviewed by panels in which adherents to the traditional theories composed less than one-half of the panel. After the Research Grants Director acquiesced in this request and appointed a special study section, the researcher's applications started to get funded. Another researcher reported that after his applications were rejected several times, he strongly suggested the names of people who would, in his opinion, objectively evaluate his proposal. Since one of these persons was already on an existing study section, the NIH staff allowed the proposal to be resubmitted to that section, and it received better scores.

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[90] Although a scientist may not sit on a panel that reviews his own grant application, the scientists who agree to sit on peer review panels do so partly on the understanding that their grant applications will have a good chance of being funded by the panel that reviews them. The members of the panel are always made aware of the fact that an applicant sits on one of the NIH panels when his application comes up for consideration.

A maverick's chances of getting funded are substantially enhanced if an NIH staffer can be persuaded to take up his or her cause before the Advisory Council. Although the resistance to the maverick proposal is still high, the staffer can argue persuasively that Einstein would probably not have been funded by a panel of his peers in the early twentieth century.

7. Tunnel Vision

Even when the applicant is not clearly a maverick challenging the dominant paradigm, study sections can become afflicted with "tunnel vision." One NCI staffer offered as an example a proposal for a novel technique for detecting the presence of certain toxic chemicals in the environment cheaply and accurately. The study section that reviewed the proposal did not believe that the project could advance scientific knowledge and gave the study low priority. The members of the study section failed to see the potentially large impact on human health that a cheap and effective exposure-avoidance device could have, despite the fact that it would not provide additional information about the chemical itself.[91] A researcher interviewed for this report related that his project to determine the effects that various components in diesel fuels have on the general population was not funded by NIH because although the reviewers were interested in the individual components of the fuel, they were not concerned with human population applications. The researcher complained: "They are never interested in projects of this sort that are highly applied in nature, nor are they interested in performing risk assessments."[92]

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[91] The story, however, has a happy ending. The staffer in charge of the project referred the applicant to the National Institute for Occupational Safety and Health, and the study was later funded.

A similar experience was related by an applicant for NIH funding:

> I got funding from EPA in FY86 for [a project] to determine which heavy metals found in the environment are toxic to the human immune system by screening, i.e., by testing the effects of many metals whose effects are not known. …My proposal for this work had been unsuccessful at NIH for three years in a row. This research was 'more applied' than the kind of projects that generally receive favorable evaluations at NIH. In addition, many people on NIH Study Sections are not very interested in environmental problems. NIH is interested in more basic research to determine the mechanisms by which human systems are affected by and respond to external factors. …EPA tends to want to know what's happening; NIH wants to understand the mechanisms by which it happens.

American Management Systems, Inc., An Evaluation of EPA's Exploratory Research Grant Program E-5 (1988) (statement of David Lawrence, Albany Medical College) [hereinafter cited as 1988 AMS Report].

[92] 1988 AMS Report, *supra* note 91, at E-6 (statem]ent of Dr. Herbert Rosenkranz, Case Western Reserve University School of Medicine). This story also has a happy ending, because the study was ultimately funded by EPA. Because EPA funds a much lower percentage of applications than NIH, however, not all such stories have happy endings.

8. Applicant Anonymity

NIH makes no attempt to shield the identities of applicants from reviewers, and the NIH staffers interviewed for this report were generally opposed to the idea, arguing that the applicant's experience or "track record" was an important aspect of the evaluation that could not be evaluated anonymously. In NIH programs that manage a small number of very large grants, applicant anonymity is impractical and it is, of course, impossible to do an anonymous site visit. Even for some of the large programs in the National Cancer Institute, agency staffers believe that anonymity would be very difficult to maintain. Reviewers who are generally familiar with the literature should be able to guess the identity of the applicant from the topic of the application.

9. Reviewer Anonymity

NIH shares a great deal of information and analysis with applicants, including the identities of the members of the study sections that review their proposals. Although the identities of the primary and secondary reviewers are not revealed, it is often relatively easily deduced by the applicant from an examination of the areas of expertise of the panel members. As one Program Director observed, "You don't need to be an Einstein to figure out who probably reviewed your proposal."

The contents of panel deliberations are supposed to be kept strictly confidential. In practice, however, there have been several serious breaches of confidentiality in some of the programs. Many NIH staffers and outside researchers interviewed for this project reported instances of breaches of confidentiality. A scientist who engages in a relatively narrow field of research can sometimes guess the identities of his or her primary and secondary reviewers and can press study section members at scientific conferences for information about what happened at study section meetings—"Did Dr. X try to deep six my grant?" In addition to breeding ugly confrontations in the hallways at scientific meetings, NIH officials fear that breaches of confidentiality will inspire an applicant to retaliate against (or reward) scientists who provided negative (or positive) reviews of his or her application in the future when the roles are exchanged and the applicant becomes the reviewer and the reviewer the applicant.

One high level NIH official complained that NIH lacks effective sanctions to back up the proscription against revealing the contents of peer review reports and meetings. The offender can be removed from the committee and barred from future committees.[93] Since committee membership is hard work, however, this is not necessarily a great penalty, even though committee membership does lend an element of prestige. One official suggested that NIH be empowered to levy fines against peer reviewers who violate their confidentiality promises.

10. Financial Conflict of Interest

Under NIH's conflict of interest regulations, a panelist's proposal may not be reviewed by his panel and he must leave the meeting before the panel considers any proposal from his or her institution. The Division of Research Grants attempts to send panelists' applications to closely related committees, but they receive no special treatment there, and they occasionally suffer from the second committee's lack of technical expertise in the relevant area. Panelists are apparently willing to accept this reduction in the chances that their proposals will be funded during the time that they serve on the panels because of the additional insight into the working of the grant process and the prestige that panel membership entails. Program Directors in the Institutes monitor the results of the peer review process to see if panelists have been unfairly evaluated in the committees to which their proposals are sent, and they occasionally make a case to the relevant Advisory Council and upper-level Institute staff for funding such proposals by exception.

Financial conflicts of interest are of special concern in programs, such as the General Clinical Research Centers and Biomedical Research Technology programs and all of the SBIR programs, that are designed to stimulate commercial development. There is an obvious financial conflict of interest when a scientist from a university sits on a peer review committee reviewing the application of a for-profit entity in which the reviewer has an economic interest. There is a less direct conflict of interest when a scientist from a competitor (or a university scientist with financial ties to a competitor) sits on the review committee for a grant proposal from the private sector. In the latter situation, the reviewer will no doubt become privy to commercially valuable information. If that information is conveyed to the competitor, it could receive an unjust commercial advantage. The guidelines do not explicitly address financial conflicts of interest that might arise by virtue of a panel member's financial stake in a private research company; nor do they address the possibility that commercially valuable information could be revealed to commercial competitors.[94]

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[93] This sanction was invoked on one occasion in NIH when a reviewer overheard another reviewer calling applicants and telling them their priority scores on a pay phone. Telephone interview with Dr. Thor Fjellstedt, *supra* note 25.

[94] NIH in fact actively recruits scientists from industry to sit on SBIR review panels, despite the obvious potential for appropriation of commercially valuable information.

In programs with a small number of applicants and awardees, like the General Clinical Research Centers and Biomedical Research Technology programs and the SBIR programs, another form of subtle financial conflict of interest can enter the picture. In such programs study panel members are invariably drawn from institutions with existing funded projects. They know that to the extent that the projects from other institutions do not get funding, more money will be available for their own institutions. In large programs with many applicants this incentive to downgrade other proposals is probably not very strong, but when only 10 or 15 major centers are funded in the country, "killing off" one center may substantially increase the probability that the remaining centers will received continued funding.

11. Research Conflict of Interest

NIH staffers attempt to fill the study sections with scientists of the very highest caliber. When a study section is composed of active scientists from a fairly narrow scientific field, it is always possible that a reviewer will use information obtained during the review process to advance his own research agenda. Alternatively, an overly aggressive reviewer may attempt to slow down the research of a competitor by giving its grant application a low ranking. One disgruntled researcher interviewed for this project related an incident in which both tactics were employed. After making a major discovery in research funded by the federal government, he met a prominent scientist at a convention and naively explained his theory to the scientist. The scientist complimented him on the quality of his work. When the young scientist submitted the project for competitive renewal after two years, the older scientist was highly critical of the project, and it was not renewed.[95] Several years later the young researcher read a paper published by the older scientist "and he did exactly what we did and published it." Another researcher reported that after the wife of one of the most prominent researchers in his field sat on a study section evaluating one of his proposals, the prominent researcher suddenly began to direct his research in the direction indicated by the applicant's research proposal.[96]

NIH staffers recognize the potential for "research conflict of interest" in which the rewards are not so much in coin as in prestige, but they report few instances in which it has been observed. By its very nature, of course, this nonfinancial conflict of interest is difficult to detect. NIH has no formal policy addressing research conflict of interest, and NIH staffers apparently do not address the problem unless an applicant requests that a particular scientist not serve as a reviewer of his or her proposal. In the final analysis, the NIH professional staff relies on the honor of the participants in the review process.

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[95] The researcher who related this story is confident that he correctly ascertained the identity of the reviewer who made the negative comments, because the jargon used in the criticism was the same arcane jargon that the researcher had employed in the previous conversation.

[96] This researcher could not be certain that the change in direction was attributable to information gleaned by the competing researcher's wife in the study section, and he is willing to give the competitor the benefit of the doubt. But he noted that the potential for abuse is clearly present.

12. Peremptory Challenges

Although NIH regulations do not give applicants the right to object to particular persons as reviewers for their applications, agency staffers often attempt informally to accommodate applicant concerns about potentially biased reviewers. This is especially true in the case of programs involving site visits where anonymity cannot be preserved. If an applicant complains in advance that a potential reviewer is likely to be biased because of past associations, research conflict of interest or even personal animosity, the staffer usually tries to avoid placing the potentially biased reviewer on the site review team. Even in programs using anonymous reviewers, if an applicant suspects that a potential reviewer will be biased against his proposal, the staff will often make an effort to see to it that the application does not go to a panel on which that reviewer sits. There are, of course, limits to which staffers are willing to insulate an application from reviewers that the applicant deems biased; they will not, for example, allow a maverick to exclude every scientist in an entire field of research.

13. Lobbying

Instances of academic applicants lobbying members of peer review panels and upper-level staff are virtually unheard of. Lower-level NIH staffers make a conscious effort to be available to potential applicants to explain the system and to help guide deserving applications to the right study sections. They attend major scientific meetings and form friendships with scientists who are current or potential grantees, but they do not receive many arm-twisting phone calls. In the relatively new area of SBIR grants, where the recipients are small companies rather than university research laboratories, there have been a few attempts to lobby the staff on the merits of particular proposals, but they are generally resisted as inappropriate.[97] The contacts between applicants and lower-level staff that do occur can have little impact on the outcome of the decisionmaking process, because the lower-level staff have virtually no input into the initial priority scorings, which are done by peer reviewers in the study sections with minimal staff input. While the staff can have some influence at the margins in briefing the upper-level staff prior to Advisory Council meetings, major departures from the rankings of the peer review panels are very rare and difficult to justify.

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[97] One NIH staffer related the experience of the Vice President of a small oil company who was amazed that his company received an SBIR grant, even though the staff never accepted any of his frequent luncheon invitations.

Occasionally, an applicant will directly contact an Advisory Council member to state his or her case. If an Advisory Council member can be persuaded to champion the cause of a rejected applicant, there is a reasonably good chance that the proposal will be funded. One NCI staffer suggested that to some extent the Advisory Councils operate as "buddy systems;" members of the Council are willing to speak up for their friends. NIH procedures do not expressly prohibit attempts by disappointed applicants to lobby members of the Councils to reverse the recommendations of the peer review sections.

14. Political Pressure

In NIH programs that administer a large number of relatively small grants to individual researchers, there are almost no reports of attempts to use the outside intervention of politically powerful actors, such as congresspersons or other officials in the Administration, to pressure the agency staff to award grants to particular researchers. Even in the programs that award very large grants to companies and institutions, there are apparently very few attempts to use politically powerful friends to influence the outcome of the process. Most contacts by congresspersons come in the familiar form of a written status inquiry that is easily answered by a polite letter explaining that the proposal did not have the "scientific quality" of the funded proposals and paraphrasing the comments on the pink sheet. The pink sheets themselves and other review information are not made available to congresspersons, unless they are requested in connection with an official congressional investigation of NIH. Some NIH staffers and researchers ventured that applicants might be reluctant to rely upon this kind of influence-peddling out of fear that the strategy might backfire by alienating the staff and members of future study sections. In any event, none of the NIH staffers interviewed for this report expressed any concern that outside political pressure was a significant factor in the funding process. None of them could remember a single instance in which a funding decision was changed because of outside political pressure.

In more recent years, congresspersons and senators who are concerned about channeling funding for large projects into their districts have taken the more direct approach of putting the funding into legislation, often by way of a rider to a different bill or a special clause in an appropriations bill. This technique for avoiding peer review, which has generated much controversy in the scientific community, will be discussed in more detail in Part 3.

15. Efficacy of Appeal Procedures

Although NIH has a comparatively extensive appeals process prior to the final funding decision, the agency staff typically discourages rejected applicants from appealing funding decisions. Instead, applicants are urged to study their "pink sheets" and submit a revised application during the next round of applications. While the Council and the panels are theoretically willing to revisit grant applications in cases in which legitimate concerns are raised, such "rereviews" occur only very rarely. As a practical matter, a rewrite and resubmittal can result in the effective reconsideration of the proposal in not much more time than it would take the appeals process to run its course with a proposal that by the end of that process might be outdated. Once the final funding decision is made by the agency, no appeals are allowed. Since the agency's regulations do not specify a vehicle for judicial review, the disappointed applicant is apparently left to his or her remedies under the Administrative Procedure Act.

III. Peer Review in the National Science Foundation

The National Science Foundation (NSF) was created by Congress in 1950 with the broad goal of promoting and advancing science in the United States.[98] Whereas the National Institutes of Health (NIH) focuses almost exclusively on research related to human health, NSF supports research across many broad areas of the physical, natural and social sciences. Because NSF does not have its own research facilities, almost all NSF-supported research is conducted in university laboratories and laboratories administered by university consortia. NSF also sponsors a relatively small amount of research in laboratories run by other government agencies (e.g., the Argonne National Laboratory and the Los Alamos Scientific Laboratory) and, more recently, at for-profit laboratories. NSF distributes more than $2 billion annually to more than 17,000 grantees.[99] During the 1980s, NSF experienced a 40 percent increase in the number of applications for research grants, while its funding remained relatively flat.[100] Fewer than 45 percent of the principal investigators who apply to NSF for funding are successful.[101]

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[98] The National Science Foundation was established by the National Science Foundation Act of 1950, 42 USC §§1861-1875. Congress provided additional authority in the Science and Engineering Equal Opportunities Act, 42 USC §§1885-1885d, and title I of the Education for Economic Security Act, 20 USC §§3911-3922.

[99] National Science Foundation, Guide to Programs FY 1991 (1991) [hereinafter cited as 1991 NSF Program Guide].

[100] Merit Review Task Force, National Science Foundation, Report of the Merit Review Task Force (August 23, 1990), at 6.

The National Science Board (NSB), composed of 25 persons (usually prominent scientists, engineers, and occasionally public figures with an interest in science) appointed for six-year terms by the President with the advice and consent of the Senate, is the primary policymaking organ of the institution. The NSB must approve most new programs and nearly all grants or contracts totaling more than $6 million or involving annual expenditures of more than $1.5 million.[102]

A. Discretionary Grant Programs

An application for NSF research can be made to a Program in any one of its eight broad Directorates.[103] Most grant applications come from educational institutions or consortia of educational institutions, a few come from for-profit companies (mostly small businesses), and a smattering come from individuals. In recent years, NSF has strongly encouraged small businesses to apply for grants under its Small Business Innovation Research (SBIR) program, and it also encourages university-industry collaborative studies.[104] Project grant funds may be used for paying costs necessary to conduct research or studies such as salaries and wages, permanent equipment, expendable equipment and supplies, travel, publication costs, and other direct and indirect costs. NSF has recently established a procedure under which a Program can award up to five percent of its budget in small grants of not more than $50,000 on an expedited basis without peer review.[105] This report will focus on two of the many NSF programs—the Program on Biotic Systems and Resources in the Directorate of Biological Sciences and the Program on Science and Technology Centers in the Directorate of Major Initiatives and Other Activities.

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[101] Defining a successful principal investigator as one who has received at least one award during a 3-year period, the success rate dropped from 45 percent to 42 percent from the 1980-82 to the 1987-89 period. Merit Review Task Force, *supra* note 100, at 12.

[102] *See* 1991 NSF Program Guide, *supra* note 99, at vii.

[103] The Directorates of NSF are: Biological Sciences; Computer and Information Science and Engineering; Education and Human Resources; Engineering; Geosciences; Mathematical and Physical Sciences; Scientific, Technological, and International Affairs; and Major Initiatives and Other Activities. 1991 NSF Program Guide, *supra* note 99, at v-vi (1991).

[104] 1991 NSF Program Guide, *supra* note 99, at vii. *See also* National Science Foundation, Small Business Innovation Research: Program Solicitation (1990). According to NSF's General Counsel, the idea for Small Business Innovation Research awards originated at NSF. Interview with Mr. Charles Herz, General Counsel, and Mr. Matthew Powell, attorney, National Science Foundation, March 13, 1992, Washington, D.C. [hereinafter cited as Herz & Powell Interview].

[105] *See* David Bjerklie, Fast-track Grants: National Science Foundation's Small Grants for Exploratory Research, 93 Technology Review 19 (1990).

1. Biotic Systems and Resources

The Biotic Systems and Resources Division, which is part of the Biological, Behavioral and Social Sciences Directorate, funds basic research in five different fields of traditional systematics and ecology.[106] Within that Division, the Biological Research Resources Program provides support for the curating, refurbishment, and computerization of systematic research collections of preserved plants, animals and fossils with the goal of conserving essential scientific resources at the national and international level and making those resources available for scientific study. Research in the area of Systematic Biology explores the identities, relationships and distributions of plants, animals, and microorganisms, and through the study of living organisms and fossils, it documents changes in biotic diversity through the earth's history. NSF funded research in ecology provides a framework of concepts on the ecology of land and inland waters and studies outside influences on the distribution and abundance of animals and plant communities. The Ecosystem Studies Program funds field, laboratory, and mathematical modeling research on ecosystems. The program on Population Biology and Physiological Ecology funds, *inter alia*, studies on the mechanisms by which traits in individuals are translated into characteristics of populations.[107]

The Division has a budget of around $65 million.[108] The size of the grants ranges from very small grants of only $5,000 to very large grants of $1,000,000. Most of the awards are for less than $100,000, and the average grant is about $70,000.[109] Approximately 15 percent of all applications are fully funded; 10 percent are partially funded; and 15 percent not funded due to lack of funds. The remaining applications are declined for lack of scientific merit or program relevance.[110] "Proven producers" have a 35-40 percent chance of receiving funding for any given application.[111]

2. Science and Technology Research Centers

The Program for funding science and technology research centers is a relatively new program aimed at providing "mechanisms to exploit opportunities in science and technology where the complexity of the research problems or the resources needed to solve them require the advantages of scale, duration, facilities, or collaborative relationships that can best be provided by campus-based research centers."[112] The goal is to "help maintain U.S. preeminence in science and technology by funding research activities that call for cooperation among a group of scientists, engineers, and their students."[113] The monies, which come in large five-year grants, are used "to fund comprehensive programs where specific problems need center-like funding to ensure world-class quality and competitiveness."[114] Although the program focuses primarily upon basic research, most centers address research topics in areas with easily identified technological applications. Examples include funding for centers on "superconductivity," "particle astrophysics," "parallel computation," "microbial ecology," and "polymeric adhesives and composites."[115]

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[106] CFDA at 798.

[107] 1991 NSF Program Guide, *supra* note 99, at 3-4 (1991).

[108] Comments of Mr. Garth Redfield, Director, Environmental Sciences Division, Research and Evaluation Department, South Florida Water Management District, on an earlier draft of this report, August 14, 1991.

[109] CFDA at 799.

[110] Telephone interview with Dr. Garth Redfield, Former Assoc. Program Manager for Ecology Programs, National Science Foundation, October 17 and 24, 1990.

[111] Comments of Mr. Garth Redfield, *supra* note 108.

Since the program was established in 1989, it has gone through two funding cycles in which funds have increased to its current annual level of around $40 million.[116] In its first two competitions, the program received about 470 applications and awarded a total of 25 grants ranging from $900,000 to $4,250,000 per year with an average of around $1,700,000.[117]

B. Criteria for Awarding Grants

Grants for most of NSF's programs can be made to public and private colleges and universities, nonprofit, nonacademic research institutions, and private profit organizations. Science and Technology Research Center awards, however, may only be made to public and private academic institutions. The applicant institutions are expected to share in the support of NSF-funded projects, either directly or indirectly by providing facilities, equipment, maintenance, etc.

General criteria for evaluating proposals include: (1) research performance competence—the capability of the investigator, the technical soundness of the proposed approach, and the adequacy of the institutional resources available; (2) intrinsic merit of the research—the likelihood that the research will lead to new discoveries or fundamental advances within its fields; (3) utility or relevance of the research—the likelihood that the research can contribute to the achievement of a goal that is extrinsic or in addition to that of the research field itself, and thereby serve as the basis for new or improved technology or assist in the solution of societal problems; and (4) effect of the research on the infrastructure of science and engineering—the potential of the proposed research to contribute to a better understanding or improvement of the quality, distribution, or effectiveness of the nation's scientific and engineering research, education, and manpower base.[118]

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[112] CFDA at 808.

[113] 1991 NSF Program Guide, *supra* note 99, at 94 (1991).

[114] 1991 NSF Program Guide, *supra* note 99, at 94 (1991).

[115] CFDA at 809.

[116] Herz & Powell Interview, *supra* note 104.

[117] CFDA at 809.

C. Procedures for Awarding Grants

The NSF peer review process does not rely as heavily upon panels as the NIH system, and it assigns considerably more discretion to the staff. For that reason, the role that peer review plays can vary from program to program within NSF.[119] When an application is assigned to a Program Officer with jurisdiction over the relevant subject matter, he or she undertakes a preliminary assessment of the proposal's subject matter and attempts to identify a group of up to ten qualified peer reviewers from among those persons in the country with expertise in the subject matter.[120] Program Officers use several resources for identifying reviewers, "ranging from lists of reviewers suggested by the applicants or current peer reviewers themselves, to contacts made by NSF staff at professional meetings."[121] The most frequently relied upon source of reviewers is a computerized list compiled and maintained by NSF staff that contains the names of thousands of potential reviewers arranged according to areas of expertise.[122] Program officers attempt to select reviewers on the basis of their expertise, objectivity, open-mindedness, and (in the case of reviewers who may be assigned to panels) ability to work with others.

Most peer reviews in NSF are "mail reviews" in which the Program Officer sends the ten or so proposed reviewers a copy of the application and a document setting out the review criteria. The letter asks the recipient to provide a written critique of the application and a rating based on the identified criteria. Since each mail reviewer receives only one of the applications in a given pool, the reviewer has no opportunity to compare the application that he or she evaluates with competing applications. Usually about five or six of the ten proposed reviewers respond to the request.

About one-third of the applications also undergo a panel review. Some programs (e.g., biology) rely quite heavily upon panels, whereas others (e.g., chemical and physical sciences) use panels only rarely for especially complicated or expensive proposals. In a panel review, the assembled experts (usually eight to fifteen) read the mail reviews and attempt to evaluate all proposals in a given pool.[123] Programs making very large awards, like the Science and Technology Research Centers program, also require site visits by peer panels. Like NIH, the panels usually allocate the workload by assigning each application to a subcommittee of two or three persons who are primarily responsible for evaluating that application. The panelists are usually invited to rank the proposals.

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[118] 1991 NSF Program Guide, *supra* note 99, at ix; CFDA at 799.

[119] Comments of Mr. Garth Redfield, *supra* note 108.

[120] In 1985, NSF asked almost 60,000 persons to serve as external peer reviewers. 1987 GAO Report, *supra* note 45.

[121] 1987 GAO Report, *supra* note 45, at 14.

[122] Comments of Mr. Garth Redfield, *supra* note 108.

After the individual and/or panel reviews have been completed, the Program Officer evaluates and ranks the proposals, taking into account the peer evaluations of the technical merit of the proposals and other factors of a less scientific nature such as "infrastructure"[124] and "equity"[125] concerns. When proposals have been submitted to a panel, the Program Officer must provide a written justification for any deviations from the panel's recommendations. In practice there is a high degree of correlation between panel recommendations and funding decisions.[126] The Program Officer's decisions are in turn reviewed by section heads and in some cases the head of the Directorate before final funding decisions are made. At the upper echelons additional considerations are factored into the decision, including long-term political concerns, technological innovation, and potential for practical application in the private sector, geographical equity in the distribution of funds, and (to a somewhat lesser extent than at the Program Officer level) overall scientific merit. On very rare occasions, upper-level decisionmakers will appoint advisory committees to provide input into the decision. Decisions to award grants of more than $1.5 million per year must be reviewed by the National Science Board, the ultimate decisionmaker at NSF.[127] The entire process normally takes about five to six months for individual research grants[128] and from ten to twelve months for major institutional grants such as grants for centers under the Science and Technology Centers Program.[129]

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[123] About one-third of all proposals to the NSF are reviewed by mail reviewers alone. Another third are reviewed exclusively by panels of reviewers who gather, usually in Washington, to discuss their advice as well as deliver it. The remaining third are reviewed first by mail reviewers expert in the particular field, then by panels, usually with more diverse expertise, who help the NSF decide among proposals from multiple fields or subfields. Letter to Eric R. Glitzenstein from Charles H. Herz, dated March 12, 1990, at 2-3.

These numbers can vary from Program to Program. For example, in the Biotic Systems and Resources Program, approximately 95 percent of grant applications are reviewed by mail. Telephone interview with Mr. Victor Westbrook, Grants Officer for Biological, Behavioral, and Social Sciences, National Science Foundation, November 2, 1990.

[124] According to one Program Officer interviewed for this Report, if a solid and consistent performer may lose his or her laboratory as a result of a decision not to fund an uninspiring application, the program officer may give it a somewhat higher priority to "save" the laboratory as an infrastructure resource. Telephone interview with Dr. Garth Redfield, *supra* note 110.

[125] Program officers must pay attention to whether minorities, women, and young investigators are fairly represented and to the geographic distribution of the awards. Herz & Powell Interview, *supra* note 104.

[126] Stephen Cole, Jonathan R. Cole and Gary A. Simon, *Chance and Consensus in Peer Review*, 214 SCIENCE 881 (1981).

[127] 1987 GAO Report, *supra* note 45, at 9-11.

NSF has prescribed detailed conflict of interest regulations for persons employed by NSF, including members of the National Science Board. These regulations prevent present and past employees from representing anyone in dealing with any federal official in any matter in which they were involved at NSF.[130] They also prohibit any NSF employee from becoming personally involved in the handling of any proposal or other matter in which the employee, a member of the employee's immediate family, or an organization of which the employee is a part or may become a part has a financial conflict of interest.[131] Finally, NSF's regulations provide that persons employed by NSF who have access to information not generally available to the public may not use that information for their private benefit or for the private benefit of others.[132] A member of the National Science Board may not participate in deliberations and votes that would affect the member's own interests or those of a close relative, or an institution with which the member or close relative has any of several designated affiliations.[133]

A separate set of regulations is directly applicable to outside peer reviewers. All peer reviewers are asked by the relevant Program Officer to reveal any possible conflicts of interest that the reviewer may have.[134] The regulations define "potentially biasing affiliation or relationship" by reference to several kinds of relationships. "Affiliations with an applicant institution" include current employment or being under consideration for employment with the relevant institution, holding an office or membership on the governing board of the applicant institution, ownership of the institution's stock, current enrollment as a student in the institution (but only with respect to applications from the student's department), and receipt of an honorarium or award within the last 12 months. Relationships with investigators that have a personal interest in the grant include marriage, business partnership, past or present association as a thesis advisor or thesis student, and collaboration on a project within the last 48 months. Other disqualifying relationships include immediate family or relatives living within the same immediate household and "[a]ny other relationship, such as close personal friendship, that [the reviewer] think[s] might tend to affect [his or her] judgments or be seen as doing so by a reasonable person familiar with the relationship."[135] All such potentially biasing affiliations or relationships must be revealed to the Program Officers.[136] Most of these relationships are "automatically disqualifying," but some are only "partially disqualifying."

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[128] CFDA at 799. Herz & Powell Interview, *supra* note 104.

[129] CFDA at 808.

[130] 45 CFR §684.14.

[131] 45 CFR §684.16.

[132] 45 CFR §§684.11(h), 684.17(a).

[133] 45 CFR §684.21. The proscribed affiliations include current employment, formal arrangements for future employment, employment as an adjunct professor, etc.

[134] 45 CFR §681.25(a).

The unique multi-tier peer review process that NSF has developed for awarding grants in the Science and Technology Research Centers Program departs from the typically applied model described above, because the awards in that Program are very large and last for at least five years. The review begins with the appointment of an initial multi-disciplinary 15-member "external peer review committee" to advise the staff during the entire funding cycle. After receiving all the applications, the agency staff divides them into specific "buckets" (categories) according to discipline. Each bucket is distributed to a separate panel of experts assembled for the purpose of reviewing the applications and the outside reviews of the applications. Each panel is staffed by several Program Directors from the programs that deal with the subject matter of the applications. The Program Directors identify eight to ten outside "mail reviewers" for each proposal and arrange in advance by telephone for the reviews. This ensures a large response rate of about 90 percent. One of the outside reviewers is also a panel member.

After the mail reviews are complete, they are sent to panel members. Two or three panel members are assigned the responsibility for detailed review of each application. The panels then meet for two days to discuss the proposals. Because the agency cannot realistically attempt more than 30 site visits,[137] each panel is told to recommend no more than three or four proposals for further consideration. This usually represents only about 10-15 percent of the applications considered by the panel. The staff may add an additional six to eight proposals to the pool recommended by the panels to make a total of 30. This latter step is an attempt to provide some flexibility to allow for any unevenness in the quality of the proposals across the six panels. It also gives the staff some discretion to overrule panel decisions. The applications are then forwarded to the original 15-member external peer review committee for discussion and a determination of which facilities will receive site visits.

Because all applicants that do not receive site visits are eliminated from the competition, the agency at this point informs all applicants of the results of the process. Applicants receive verbatim copies of all mail reviews (with reviewers' identities redacted) and copies of the summaries of the panel meetings relevant to their proposals. The panel summaries are intended to give the applicants some idea of how their proposals fared in relation to the others that the panel considered. Typically, the panel summary is drafted by the panel member who presented the proposal to the panel, and it is circulated to the remaining panel members for suggested corrections or additions. The 30 or so applicants that are chosen for site visits receive the above information and a list of questions to be answered in anticipation of the site visit. They are also invited to comment on the mail reviews and panel summaries. Finally, the 30 remaining applicants are asked to provide two-page updates of their proposals to identify any changes that have occurred during the six to eight months since the original proposals were submitted. Applicants may also make changes in priorities and in their budgets at this point.

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[135] 45 CFR §681.21.

[136] 45 CFR §681.25.

[137] This conclusion was based on the experience of the first Science and Technology Center competition. Herz & Powell Interview, *supra* note 104.

Site visits are conducted by teams of around eight members consisting of one or two members of the peer review panel that reviewed the original proposals, one or two staff members, one member of the 15-member external review committee, and other scientists with expertise in the relevant area. The site visit team receives all of the information that is in the file about the proposal, including the institution's response to any questions posed by the external peer review committee. After meeting with officials and researchers at the applicant institution for two days, the site visit team prepares a five to six page report discussing the strengths and weaknesses of the proposal with respect to the quality of the researchers, depth of institutional support and overall educational climate at the institution. The site visit team must answer specific questions posed by the external peer review committee and identify the strengths and weaknesses of the application, but it is not supposed to recommend whether the proposal should or should not be funded. Because the agency staff has some fear that site visit teams will become "cheerleaders" for the sites that they visit, they request that the reports be as dispassionate and objective as possible.

The site visit reports are given to the external peer review committee, which has by now been expanded from 15 to 25 members to lend additional expertise to the consideration. Each panel member is given a large binder with an abstract, executive summary, budget and all reviews of each of the 30 proposals, but the work of providing intensive reviews of individual proposals is assigned to subcommittees of three reviewers. The external peer review panel is divided into two groups for the detailed consideration of the proposals. The reason for this further subdivision is the practical impossibility of ensuring that no member of the 25-member committee participates in the evaluation of an application from his or her own institution. Because it is virtually certain that one or more members will be from one or more institutions with proposals before the committee, the staff ensures that no member is on the half of the committee that undertakes the *first* assessment of the proposal from his or her institution, and that person also leaves the room while the second half of the committee considers the first evaluations. Each group is asked to rank all of the proposals and to choose the top seven to ten. On the second day of the meeting, the groups exchange rooms and each reviews the work of the previous group to see whether it agrees with the prior group's rankings. On the third day, the committee attempts to arrive at a consensus on about 17-20 proposals that deserve funding. The Director of the Science and Technology Center Directorate then recommends 10-15 from among the proposals recommended by the external peer review committee for presentation to the National Science Board, the ultimate policymaking entity in NSF.

One NSF staffer from another program suggested that the peer review process in place at the Science and Technology Centers Program is "the best in the world."[138] There can be little doubt that it is one of the most thorough and complex peer review systems in the world. The redundant layers of peer review are justified by the large sums of money that are at stake and the temptation that would otherwise exist to fund centers in a biased fashion on the basis of criteria other than scientific merit.

D. The Process in Operation

The procedures in NSF for making information available to applicants and the public and for allowing rebuttals and challenges to nonfunding decisions have been evolving over the last several years from a relatively closed and unresponsive system to a comparatively open one. This evolution was nudged along by a petition from a researcher who (with the support of a Ralph Nader-affiliated public interest organization called Public Citizen) had the persistence to prove that the system had wronged him and the courage to demand that the agency ensure that what happened to him would not happen to future researchers.[139] .

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[138] Telephone interview with Dr. Garth Redfield, *supra* note 110.

[139] NSF attorneys dispute the conclusions that any significant change was brought about as a result of the Nader-sponsored Kalb rulemaking petition. Noting that the Kalb petition was unique in the history of NSF, they maintain that the agency had already adopted and had been implementing nearly all of the changes that Kalb demanded in his petition. They contend that in many ways (e.g., the ability of the applicant to read the actual written reviews of the reviewers) the NSF system has always been more open than the NIH system. Many NSF staffers believed that the Kalb petition was "making a mountain out of a molehill," because nearly all of the information that Kalb was requesting would have been available to him without his reliance on the Privacy Act. Herz & Powell Interview, *supra* note 104.

1. The Kalb Litigation

In the late 1970s, Jon Kalb applied for an NSF grant to continue his anthropological research in Ethiopia.[140] The research, for which Kalb held an exclusive concession from the Ethiopian government, was the subject of three separate proposals by principal investigators from Southern Methodist University, New York University and Harvard University. He later learned that the NSF staff had informed the peer reviewers for all three of these proposals of rumors that he was associated with the Central Intelligence Agency (CIA) and that his scientific efforts were merely a cover for covert activities in that country. Kalb alleged that one source of the rumors was one of the reviewers assigned to his grant application who in turn learned of them from the head of a rival research group. In fact, one of the reviewers of the Harvard proposal wrote the following in his review: "The qualifications of the senior personnel are beyond question and this reviewer is fully in sympathy with Mr. Kalb's efforts and energy in getting the [project] together. However, his possible involvement with the CIA must, until this has been cleared up, remain a matter of concern for any scientist."[141] The scientist who wrote this review had hoped to become a collaborator at Kalb's site, but Kalb declined his overture just a few weeks before the review was written. It is reasonably clear from after-the-fact attempts to reconstruct the meetings of the peer review panels that Kalb's alleged involvement with the CIA was a prominent consideration in the panels' deliberations, even though it was never mentioned in the written minutes of those meetings.[142] After all three applications were rejected and after Kalb and his family were expelled from Ethiopia because of the same rumors, the reviewer who brought the CIA rumors to the attention of one of the panels applied for and received an amendment to an existing grant allowing him to use NSF monies to take over the concession that the Ethiopian government had previously awarded to Kalb.[143]

Kalb attempted to challenge the decision not to fund his project, but he was blocked at every turn by the secrecy that NSF demanded for the peer review process and by the staff's general lack of responsiveness. After ten years of challenges, during which he attempted to demonstrate that the rumors were false and that they had affected the decision on his proposal, Kalb finally sued the agency. The lawsuit resulted in a settlement under which NSF issued a formal apology to Kalb and paid his attorneys' fees of approximately $20,000.[144]

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[140] The proposal was submitted jointly by Kalb and researchers from Southern Methodist University and New York University. The story of the Kalb petition is related in considerably greater detail in ROBERT BELL, IMPURE SCIENCE: FRAUD, COMPROMISE, AND POLITICAL INFLUENCE IN SCIENTIFIC RESEARCH, ch. 1.

[141] *Id.* at 21.

[142] *Id.* at 16-20.

[143] *Id.* at 22-23.

Not long after the settlement, Kalb and Public Citizen filed a petition with NSF asking the agency to write new procedures, pursuant to the Privacy Act[145] and the Federal Advisory Committee Act,[146] for providing applicants with access to information concerning their applications and for giving them a realistic opportunity to rebut any false allegations made during the review process. Unlike NIH, NSF had not officially maintained a "system of records" capable of retrieving information about an individual by name or personal identification number, and it therefore had not subjected its peer review proceedings to the Privacy Act. Kalb's attorneys argued that the agency had nevertheless maintained a de facto "system of records" in violation of the Privacy Act.

The petition demanded that NSF correct four alleged basic flaws in its peer review system:

> (1) applicants are being deprived the right to gain access to, and the opportunity to amend, vital information considered in the peer review process;
>
> (2) applicants are not afforded advance notice of, and an opportunity to rebut non-scientific derogatory information prior to final decision-making;
>
> (3) applicants do not have the opportunity to prevent conflicts of interest by those involved in the review and evaluation process; and
>
> (4) the appeals process is woefully inadequate.[147]

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[144] Kalb v. CIA, CIV. No. AE6—3557 (D.D.C. Dec. 8, 1987). *See NSF Admits Spreading Spy Rumor: Agency Apologizes To Grant Applicant*, Washington Post, December 4, 1987, A25.

NSF attorneys maintain that the payment of attorneys' fees was solely for the purpose of eliminating the "nuisance value" of the lawsuit and in no way constituted an admission that the agency had wronged Kalb in any way. In particular, NSF attorneys maintain that the rumors did not affect the outcome of the agency's treatment of Kalb's proposal. Herz & Powell Interview, *supra* note 104.

[145] 5 USC §552b. The Privacy Act requires federal agencies to protect personal information in agency files from unauthorized disclosure, to publish descriptions of the existence and nature of the records containing personal information about people, and to give individuals access to review and copy information about themselves and to demand that the agency correct any information that is not accurate, relevant, complete or timely. The Act, however, only applies to "systems of records" from which records are retrieved by the name of an individual or other personal identifier. This latter qualification has proven controversial and difficult to interpret.

[146] 5 USC, App. 2. The Federal Advisory Committee Act requires federal agencies that rely upon recommendations of advisory committees to charter those committees. The charter must set out the committee's objectives, duties, number and frequency of meetings, and termination date. The agency must prepare minutes for advisory committee meetings and make those minutes available to the public, subject to the exemptions in the Freedom of Information Act.

[147] Petition for Rulemaking by Public Citizen and Jon Ervin Kalb, July 13, 1989, at 4.

Acknowledging that the peer review system must be kept confidential from grant applicants to ensure frank and candid options and that peer reviewers must therefore remain anonymous, the petition maintained that NSF had gone far beyond what was reasonably necessary to ensure the confidentiality of the review process. Kalb demanded that NSF "amend its procedures to ensure that grant applicants have sufficient access to and the opportunity to amend records regarding the consideration of the grant proposals."[148]

The petition first urged NSF to acknowledge its Privacy Act obligations to make information in review files available to applicants along the lines of the NIH model and to inform applicants of their Privacy Act rights. Second, the petition demanded that applicants be given access to the contents of all outside reviews prior to any final decisions on their applications. Third, it asked NSF to comply with its Federal Advisory Committee Act obligation to make complete minutes, rather than staff summaries, of peer review panel meetings available to applicants. Fourth, the petition insisted that NSF adopt special procedures to give applicants an opportunity to learn about and rebut derogatory, harmful or nonscientific information and allegations of misconduct before the final decision regarding a grant proposal. Fifth, the petition requested NSF to adopt a procedure for allowing applicants to play a role in guarding against research conflicts of interest.[149] Acknowledging that allowing applicants to play a role in identifying potential conflicts of interest might threaten the confidentiality of the reviewers' identities, the petition suggested that NSF could make available a list of potential reviewers to applicants in advance and allow applicants to object to any listed scientists that might have a research conflict of interest. Kalb hoped that such a procedure would help avoid conflicts in which a researcher could potentially affect the prospect of funding for a major competitor. Finally, the petitioners asked NSF to amend its appeals process to make it more accessible to rejected applicants.[150] Once again, the petitioners suggested the NIH appeals process as a model.[151]

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[148] *Id.*

[149] The petitioners pointed out that: "While NSF's rules recognize the need to guard against traditional, financial, institutional, and personal conflicts of interest, they say nothing about the kinds of conflicts that may be of even greater concern to scientists—direct conflicts of interest regarding the specific research covered by a particular proposal." *Id.* at 26. The petitioners noted that "[t]here is obviously a great potential for bias if a scientist that is asked to review a grant application is already conducting the same or very similar research to that being proposed by the grant applicant, particularly if the reviewer believes that the proposed research may, if funded, somehow preempt or hinder his own work." *Id.*

[150] The petitioners noted that NSF's office of the Deputy Director had recently concluded that only a total of five proposals were successfully appealed during the five-year period preceding 1985. *Id.* at 32.

[151] The petitioners asked NSF to adopt rules amending its appeals systems to provide that (1) principal investigators have an opportunity to examine and seek amendment of all nonexempt portions of records considered or generated by NSF in the course of denying a grant application; and (2) grounds for appealing a denial of a grant include a demonstration that "(a) any records relied on in the

On March 12, 1990, NSF responded to the petition. Rejecting most of the petition's allegations, the agency noted that it had already adopted most of the petitioners' suggestions.[152] Without conceding that it had maintained a de facto "system of records," the agency agreed to continue making all reviews, notes of telephone conversations with reviewers, and summaries of the contents of any panel meetings available to applicants after the agency's final decision. Only the names of reviewers and the contents of competing proposals would be redacted. Written reviews and summaries of panel meetings would be mailed automatically to applicants. NSF further agreed to make greater efforts to inform applicants of their Privacy Act rights.

The agency rejected the proposal that it establish an additional process for allowing applicants to rebut nonscientific statements and innuendo prior to making final awards decisions. Noting that it had already adopted a policy prohibiting the consideration of reviews demonstrating bias or containing personal attacks, NSF determined that it would be too burdensome to allow a formal rebuttal to all applicants who desired to challenge the process.[153] The agency raised the difficulty of distinguishing rebuttals based upon alleged bias from rebuttals attacking the scientific merits of the reviews and rankings. NSF noted that declined applicants could submit petitions for reconsideration after-the-fact if they believed that they had been the objects of animus.

On the question of research conflict of interest, NSF agreed to provide computerized rosters of all potential reviewers to applicants, to invite applicants to suggest the names of persons who might be biased against their proposals, and to give this invitation prominence by making it part of the agency's acknowledgment letters. Although the agency made no commitments to follow the principal investigators' suggestions, it anticipated that most would be honored.[154] It declined to make public the names of potential reviewers that it decided to disqualify.

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decision are incomplete, inaccurate, untimely, or irrelevant; (b) a conflict of interest or bias influenced the adverse decision; and (c) there was substantive or procedural error in the process of peer review, including violations of the Privacy Act, the Federal Advisory Committee Act, or other applicable federal statutes or any NSF regulations or guidelines." *Id.* at 36.

[152] Letter to Eric R. Glitzenstein from Charles H. Herz, *supra* note 123. For example, with the exception of telephone notes, all of the listed procedures had been followed in the Directorate of Biological Sciences for almost a decade prior to the Kalb petition. Comments of Mr. Garth Redfield, *supra* note 108.

[153] The committee explained:

> [W]e concluded that the costs of such a formal and automatic process would outweigh the benefits. Among the costs would be weeks or months of delay in the review of every proposal, thousands of hours of effort by principal investigators, similar demands on the time and energy of already stressed NSF program staff (with consequent sacrifice of other services to the scientific community and the public), and frustration all around when little changes as a result.

Letter to Eric R. Glitzenstein from Charles H. Herz, *supra* note 123, at 9-10.

[154] *Id.* at 13.

With respect to appeals, NSF noted that its recently implemented Privacy Act procedures would provide all applicants an opportunity to correct any errors in their application jackets after-the-fact by way of asking for reconsideration. The agency agreed, however, to amend its regulations to clarify that motions reconsideration would not be restricted to procedural grounds, but could also address bias, conflict of interest, and the scientific merits of the decision.[155]

The NSF response to the Public Citizen petition describes a system that is very similar to the system in effect at NIH with the notable exception that NSF allows rebuttal only after the final rankings and funding decisions have been made. The discussion below, which focuses on the same issues that have arisen in the context of NIH peer review, suggests that the changes have not been cost-free, nor have they been entirely effective. Nevertheless, they go a considerable distance toward eliminating the preexisting potential for bias that gave rise to the Kalb controversy.

2. Feedback and Rebuttal

Even before the recent procedural changes, NSF staff wrote a letter to rejected applicants explaining in greater or lesser detail (depending on how close the application was to the margin) the reasons for the rejection. The letters encouraged applicants who were nearly funded to apply during the next funding cycle and offered suggestions for improvement. Applicants who were far from the margin were subtly encouraged not to try again. In the past, a rejected applicant was limited to telephoning the Program Officer or perhaps the upper-level program director. These sometimes impassioned encounters could take their toll on the morale of the Program Officers, especially when they could not share the peer reviewers' reports with the rejected applicants. NSF's policy of making redacted versions of all reviews, notes of telephone conversations with reviewers, and summaries of the contents of any panel meetings available to applicants after the agency's final decision should help alleviate this situation. NSF applicants will now have access to six to eight individual reviews, as compared to the comments of two council members that are included in NIH "pink sheets." Rejected applicants are generally appreciative of the feedback that these informational requirements provide.

The agency still does not provide a rejected applicant an opportunity for rebuttal. NIH provides a limited rebuttal opportunity by circulating the "pink sheets" containing reviewers' comments to applicants in sufficient time for the applicants to prepare written rebuttals for the relevant Advisory Council prior to its consideration of the application. NSF could implement an effective opportunity for rebuttal by allowing applicants to submit written rebuttals to their Program Officers prior to their ranking of the proposals for submission to the section and Directorate directors. NSF took the position in response to the Kalb petition that this would be too burdensome, but it is no more burdensome than the process that has already been effectively implemented at NIH. One former NSF program officer suggested that comparing NIH with NSF is inappropriate, because individual program officers in NSF have much higher workloads that their equivalents in NIH.[156] While it is true that NSF program officers are overworked, sometimes handling as many as 200 actions per year,[157] they are generally available for questions and requests for status reports from applicants and potential applicants. The additional burden of the few rejected applicants that are likely to take advantage of the rebuttal opportunity should not be excessive. If the additional burden is too great, the answer may lie in reducing the workload on the program officers, rather than running a system that is perceived to be unfair. The NIH experience suggests that rebuttals are extremely rare and therefore do not consume many staff resources. Indeed, NSF's implementation of a formal reconsideration process in response to the Kalb petition did not generate the predicted "wave of reconsideration requests."[158]

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[155] *Id.* at 15. This change was implemented in July 1990. National Science Foundation, Important Notice to Presidents of Colleges and Universities and Heads of Other National Science Foundation Grantee Organizations, Notice No. 109, July 17, 1990.

NSF also alluded to the difficulty of distinguishing rebuttals based upon alleged bias from rebuttals attacking the scientific merits of the reviews or ranking, a distinction that has not frustrated the rebuttal process at NIH. In any event, some additional burden may well be outweighed by the additional sense of fairness that should accompany a process that allows rejected applicants to cure clear factual errors.

3. Favoritism

The mail review system in place for most grant programs at NSF is susceptible to favoritism on the part of Program Officers. The Program Officers, who select the mail reviewers, are generally familiar with their outlooks and biases. By assiduously or unintentionally selecting reviewers who are likely to look favorably upon a particular researcher or kind of research, a Program Officer can subtly "stack the deck" in a way that increases the likelihood of favorable reviews and decreases the likelihood of unfavorable reviews. Two procedures in place at NSF help ensure against "stacking" the reviews. First, Division

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[156] Comments of Mr. Garth Redfield, *supra* note 108.

[157] Comments of Mr. Garth Redfield, *Id.*

[158] Memorandum to Members of the National Science Board from Walter E. Massey, Director re: Annual Report on the NSF Proposal Review System, April 24, 1991, Attachment I, at 3. *See also* Memorandum to Members of the National Science Board from Walter E. Massey, Director re: FY 1991 Annual Report on the NSF Proposal Review System, March 1992, Attachment I, at 2.

Directors monitor the peer review selections of the Program Officers serving under them, and they keep an eye out to ensure that selection is not biased.[159] Second, many Program Officers rotate from program to program every one to two years, thereby ensuring that any bias is not perpetuated.[160]

4. Old Boy Network

Just as in NIH, an old boy network can dominate the NSF peer review process. One NSF Program Officer candidly observed:

> There really is a conservative bias. This is a closed community of people and they all know each other. It is real peer review and can be incestuous, making it hard for a new university to break into a field unless the peer reviewer will let them in. The peer reviewer has incentive not to because it would often be his/her own institution that would lose out because they are competitive with the applicant.... It is really a closed club where only certain schools can get funded for the most part.

This suggests that the old boy syndrome can sometimes be so strong, especially in very small programs that award a few very large grants, that the reviewers almost have a financial conflict of interest. On a broader level, a study sponsored by the Los Angeles Times under the direction of California Institute of Technology political science professor Bruce Cain determined that prior to 1982, 20 academic research institutions received 41 percent of all federal research money allocated to universities. The remaining 59 percent was distributed among the 570 institutions.[161]

The power of the old boy network is revealed by a rare public outcry against an NSF decision to fund a large research facility at the Florida State University instead of the Massachusetts Institute of Technology. Although the peer review panel seemed to favor the MIT proposal, the State of Florida and the local business community rallied around the Florida proposal with promises of additional financial support that were unmatched by the MIT proposal.[162] When

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[159] Comments of Mr. Garth Redfield, *supra* note 108.

[160] It is, of course, also possible to "stack" review panels, but it would probably be difficult for the Program Officer to protect the identities of panel members from public disclosure. In addition, the panelists themselves can detect and report instances of apparently biased selection. Comments of Mr. Garth Redfield, *supra* note 108.

[161] Frank Clifford, *Worrisome Trend; Research Funds: Not so Scientific*, L.A. Times, 11/27/87, Part One, pg. 1, col. 1.

[162] Charles A. Radin, *New Forces Drew Lab From MIT*, Boston Globe, 9/21/90, Metro/Region p. 1. The Florida legislature appropriated $28 million for construction and a $5 million per year operating

MIT officials and Massachusetts representatives complained that the peer review panel had indicated that the Florida group was not as highly qualified from a scientific standpoint,[163] Southern representatives responded that NSF panels were generally biased toward the Northeast and Pacific Coasts.[164] NSF staffers are quick to point out that the Florida-MIT controversy is very unusual, because the agency nearly always goes along with the peer reviewers, even when the staff suspects that an exclusionary old boys club is at work.[165] They also maintain that the staff usually goes to great lengths to ensure against regional bias. The Florida award over the contrary advice of the peer review panel may, in fact, reflect that very concern.[166]

5. Halo Effect

The extent to which the halo effect affects rankings in NSF depends upon the program. In some programs, proposals from highly regarded researchers are routinely funded even though they are sometimes of uneven quality. Other programs take pride in their refusal to look beyond the last funded grant in evaluating an individual's application. One Program Officer reported that when "famous people jot down notes and throw them at us, we'll turn them down and love doing it." Consequently, research careers in programs that do not give much credit for past performance tend to end relatively quickly. Forty-five year-old researchers close down their laboratories after 20 years, because they cannot compete with 25 year-old "hot shots" who put in 20-hour days. The cycle repeats

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subsidy. MIT proposed only to renovate an existing laboratory that was located in an old bakery. MIT made no special effort in the state legislature or in Washington, D.C.

[163] David L. Chandler, *Kennedy, Kerry Query Science Award*, Boston Globe, 10/6/90, p. 48; John Wilford, *MIT Sales Panel Choice of Florida for Magnet Center*, N.Y. Times, 9/7/90, A16, Col. 5; William Booth, *MIT Indignant Over Contract Award by NSF*, Washington Post, 9/7/90, A13.

[164] The Chancellor of the University of Florida System responded to the criticism of NSF's award as follows: "The South has been getting cheated. If you look and count the money, you'll see where the money goes. I've been around long enough to know that all the wisest people in the world do not live in California and the Northeast."

Representative Michael Andrews of Texas stated: "There is what we call 'brother-in-lawing' going on. Many of the boards continue to be filled with academicians from the Northeast and West, and we never have the votes to direct some of these dollars back to the Sun Belt." Naftali, Bendavid, untitled, States News Service, 9/30/88.

[165] Telephone interview with Mr. Victor Westbrook, *supra* note 123.

[166] Frank Press, the President of the National Academy of Sciences offers a different explanation for the Florida State award. He suggests that it reflects a fundamental shift in the reasons for funding scientific research at the national level from national defense to economic development. "[T]his shift from national security to economic growth guarantees that science funding becomes more a function of politicking than dispassionate peer review as states decide that they're entitled to their fair share." Michael Schrage, *Blurring the Line Between Funding Science and Funding Economic Growth*, Washington Post, 10/5/90, F3.

itself as the younger researchers acquire additional responsibilities and begin to burn out.

6. Personal Animus

Although NSF receives very few complaints of personal animus on the part of mail reviewers, they are not unheard of. One researcher interviewed for this report maintained that the mail review of one of her applications consisted largely of a personal attack on her. NSF's new procedures (which were generally followed in the past in most NSF programs) allow an applicant to suggest "a brief list of persons who should not be asked to review a particular proposal,"[167] and NSF generally honors such requests. Although the staffers and researchers interviewed for this report did not report any instances of animus on the part of NSF staff, the outside reviewer system would allow a Program Officer to "stack the deck" against a particular person or point of view, just as the deck can be stacked to favor an applicant. As previously discussed, Division Directors keep an eye out for this possibility as part of their general oversight functions.

One researcher observed that it is not uncommon for mail reviewers to vary dramatically in their evaluations of the same proposal. For example, sometimes a single proposal will be assigned a rating of "1" from one reviewer and a rating of "5" from another. It is possible to interpret instances in which a single proposal receives rankings at both extreme ends of the ranking system as evidence of animus, but it is more likely evidence of inconsistency due to the inability to articulate and apply precise criteria for scientific merit.[168]

The multi-tier review process in place at the Science and Technology Research Centers Program very effectively shields proposals from animus, once the proposals have made the 30-application cutoff. The site visit teams are not asked to evaluate the proposal numerically, and they are pressed toward a consensus answer to each of the specific questions that the agency staff poses to them in writing. It would be very difficult for animus to infect the exceedingly diligent review that the proposals receive at the four-day meeting of the external peer review panel. The great care that the agency took to shield the process from favoritism also effectively shields it from animus.

7. Mavericks

Like NIH, NSF has struggled with how to respond to "mavericks" who submit proposals that are outside the dominant paradigm. NSF peer reviewers have difficulty distinguishing the potentially brilliant paradigm-shifting proposal from the hare-brained idea. According to one NSF staffer, it is always easy to fund the principal investigator with an excellent reputation and a perfectly designed study on a topic that is not very interesting. An NSF-funded researcher who has also conducted many mail reviews and participated in site visits, observed that there is a definite "conservative" bias in the peer review system in favor of "trendy" approaches and against proposals that suggest new or innovative approaches to uncovering scientific truths.

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[167] NSF Notice, *supra* note 155.

[168] While this should provide some comfort to those who fear that the system might be irrationally biased against them, it does not speak especially well of peer review as a vehicle for choosing projects with the greatest potential for success.

Especially in times of tight funding, peer reviewers are very reluctant to take a chance with an unproven investigator who offers up a potentially fascinating project with a high probability of failure. The agency is more likely to fund an unorthodox proposal from an established investigator. Mail reviewers tend to view out-of-the-ordinary proposals very critically. Some Program Officers therefore believe that they have a responsibility to keep an eye out for mavericks who deserve funding and to shield them from negative peer reviews. According to one Program Officer, peer review panels should be instructed to look kindly upon proposals that are innovative and interesting, even if they have a few technical problems. Given their very heavy workload, however, Program Officers do not have much extra time to monitor the peer review process for bias against innovative proposals.

NSF's unique program for awarding small seed grants for novel proposals outside the formal peer review channels is an attractive vehicle for avoiding the tendency of peer review to ignore mavericks. A Program Director may set aside up to five percent of the Program's funds for these expedited awards of up to $50,000. Because it vests complete discretion in the Program Director, it can be used to fund pet projects of little scientific value, but the $50,000 cap ensures that not too much money is devoted to any single project before it is forced to prove itself in the formal peer review process. According to one Program Director, NSF is funding some "really neat stuff" through this very limited program.

8. Tunnel Vision

Sometimes peer reviewers in a narrow scientific field fail to see the relevance of proposals to the overall scientific enterprise or to the general welfare. For example, one researcher who applied to both NSF and EPA for grants reported:

> The success of a proposal often depends on the reviewers' perceptions of what constitutes technical merit. In 1982, my proposal received a very high rating from the EPA review panel. The very same proposal was not funded at NSF, despite generally good reviews. One reviewer in the biological

> program didn't like it, possibly because it had an engineering perspective. This negative vote was the kiss of death.[169]

While it is fortunate that another funding agency was available to support the project, NSF's review was apparently affected by one reviewer's tunnel vision.

9. Applicant Anonymity

NSF makes no attempts to shield the identity of the applicant from the reviewers. One advantage of letting the reviewers know the identities of the applicants is that it greatly facilitates the ability of the reviewers to uncover plagiarism or stolen ideas on the part of applicants. On two or three occasions instances of plagiarism have been detected in this way in the Biotic Systems and Resources Program. These cases were referred to NSF's Inspector General.[170]

10. Reviewer Anonymity

Some observers have argued that NSF's reforms should go further to reveal the identities of peer reviewers in addition to the contents of their reviews.[171] Although this issue is fairly debatable, the vast majority of scientists involved in the peer review process oppose it on the convincing ground that candor would suffer dramatically if this reform were introduced. One NSF-funded researcher commented that excessive curiosity about who is on one's review panel is a "sign of paranoia," and predicted that revealing the identity of reviewers could be "debilitating" to the system.

Public Citizen's less radical suggestion that applicants be allowed to review lists of potential reviewers of panelists and to raise objections prior to the consideration of his or her proposal should go a long way toward reducing the potential for research conflict of interest. The proposal would be far more useful, however, if the agency made an effort to provide more narrowly focused lists of potential reviewers to applicants who requested them.

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[169] 1988 AMS Report, *supra* note 91, at E-2 (quoting Joseph DePinto, Clarkson University).

[170] Telephone interview with Mr. Victor Westbrook, *supra* note 123.

[171] *See* Chubin & Hackett, *supra* note 3, at 203-04. Chubin and Hackett argue: Reviewers and referees should sign their reviews and should be openly associated with the work they approve or disapprove. This would hold reviewers publicly accountable for their decisions and would take a step toward acknowledging the value of reviewers' work. No longer would it be convenient for a reviewer to trash another's work. Nor would it be advisable to endorse unexamined work.... [W]e understand that removing the shield of anonymity may reduce reviewers' candor and put them at risk of reprisals. But the current practice is semi-open, with authors and proposers free to speculate about their critics' identities and, inappropriately, to reply in kind. To the extent that some of these reprisals are certain to be in error, our proposal will eliminate such mistakes. Better still, by making open review the usual practice, all would live in glass houses, not just those with tell-tale points of view, writing styles, or typefaces. Most importantly, the communal character of science would be openly recognized and reinforced, the tide of covert careerism would be stemmed (or brought into the open), and the opportunities for communication among scientists would be improved. *Id.*

11. Financial Conflict of Interest

There appears to be less concern among NSF staff and NSF-funded researchers about financial conflict of interest than in NIH. The biotechnology boom hit NIH earlier than NSF, and not as many NSF-funded researchers have private positions or consultantships with private companies. Concern in NSF will no doubt grow as university-industry ties spread into other areas of scientific research such as computer sciences.

12. Research Conflict of Interest

The Kalb story relates how a researcher with an interest in a limited resource can use his or her position as a reviewer of a competitor's grant application to enhance his or her own prospects for success. The potential for this sort of research conflict of interest is difficult to avoid in programs, like the Science and Technology Centers Program, that make very large grants to a small number of applicants. One researcher observed that virtually every major research institution in the country either has or is applying for one of these large awards. It is therefore difficult to find qualified scientists for mail reviews who are not associated with a competing institution. Every outside reviewer from a competing institution knows that the chances of his or her institution receiving one of the 10-15 annual awards are higher if proposals from the other institutions are downgraded. The fact that the reviewer may not participate in the consideration of the reviewer's institution's proposal does not prevent the reviewer from commenting adversely on remaining proposals. To some extent, this potential conflict of interest can be avoided by seeking out scientists from industry, and by carefully monitoring the meetings of the multiple panels.

As in NIH, it is possible for an application to be downgraded by a reviewer who feels threatened by the proposed research. One NSF-funded researcher noted:

> Sometimes your proposal is an alternative hypothesis to someone's work. If they don't like it or it threatens their work, they'll strike it down. Program directors usually oversee this, but they are too busy and sometimes this bias leads to rejected proposals.

Even after implementation of the promised changes, it is not clear that NSF's conflict of interest policies will prevent research rivals and colleagues of research rivals from reviewing proposals.

None of the NSF officials or researchers interviewed for this report knew of any instances in which an applicant claimed that his or her ideas were appropriated by a reviewer. They suggested that, like cases of plagiarism, instances of stolen ideas would be referred to the agency's Inspector General.

13. Peremptory Challenges

The typical project grant program in NSF allows two forms of peremptory challenges. First, applicants may request the long list of potential reviewers that each Program prepares and request that his or her proposals not be sent to specific persons on that list. If the applicant provides good reasons for the request, the Program Officer usually honors it. Second, after a rejected applicant reads the comments of the reviewers, he or she may request that a particular reviewer not be allowed to review his or her applications in the future. Once again, reasonable requests are usually honored. Thus, peremptory challenges are allowed in the context of a system in which reviewer anonymity is preserved.

14. Lobbying

Like NIH, NSF encourages applicants to stay in frequent contact with the NSF staffer assigned to his or her proposal. Most successful applicants believe that this is very sound advice. The staff can offer valuable suggestions to enhance a proposal's chances of success. The primary difference between NSF and NIH lies in the power of the lower-level staff to affect the outcome of the decisionmaking process. Whereas NIH staffers have very little influence over substantive outcomes, lower-level NSF staffers are quite influential, because they make the initial rankings. On the other hand, the discretion of the NSF staff is considerably limited by the quantitative nature of the scoring by the outside peer reviewers. As in NIH, it is difficult to justify departures from the ranking determined by averaging the reviews. None of the NSF staffers and researchers interviewed for this report reported instances of rejected applicants' lobbying upper-level officials at NSF to overturn funding decisions made by Program Officers on the basis of mail reviews. Because the identities of mail reviewers are kept strictly confidential, especially during the time that the actual review is being carried out, it is virtually impossible for an applicant to bend the ear of a peer reviewer.

15. Political Pressure

As with NIH, outside overtures to NSF usually come in the form of easily answered status inquiries from congresspersons. Lower-level NSF staffers did not report any overt attempts to pressure the agency to fund individual applicants. The practice is, in fact very much frowned upon in the research community.

According to one NSF-funded researcher, "This is a touchy subject. Generally, applicants don't want outside pressure, even if it's for them because it's looked down upon." Applicants who might be tempted to bring outside pressure to bear on the process know that the tactic may backfire as future panels place proposals from such pushy researchers at the bottom of their lists. Even in the Science and Technology Research Centers Program, in which very large five-year grants are made to less than 15 institutions per year, there is very little outside political pressure. In any event, the reviewers, who have the primary responsibility for evaluating the proposals, are shielded from outside pressure by upper-level NSF staff. For example, the staff does not even allow applicants to have fancy receptions for site visit teams.

16. Efficacy of Appeal Procedures

Since a proposal can usually be resubmitted within months of the first rejection, researchers are far more likely to accept the agency's standing offer to revise and resubmit declined applications than they are to invoke the possibly lengthy appeal process. The NSF response to the Public Citizen petition noted that the appeals process was rarely used in the past; its refusal to allow an opportunity for rebuttal prior to the grant awards will ensure that it will continue to be rarely invoked.

17. Program Evaluation

In 1989, NSF established a program for peer review of its peer review process. Each NSF Directorate appoints a "Committee of Visitors" to examine the agency's files and evaluate the peer review process in operation at three-year intervals. Each Committee must be "balanced in terms of its views on programmatic issues and in regards to the institutional, geographic and personal characteristics of its members."[172] At least two members may not be serving on any NSF advisory committee and may not have been applicants to the program under review for at least five years.[173] Each review must address: "(a) the integrity and efficiency of processes used to solicit, review, recommend and document proposal actions; (b) the relationship between award decisions and program goals; and (c) program support of Foundation-wide initiatives." Other topics that should be addressed where relevant include whether "an adequate number of high quality reviewers with technical competence and freedom from bias" were selected for each proposal and whether the program demonstrated a "balance of awards in terms of subject matter, size versus number of awards, and age, experience and geographic distribution of principal investigators."[174] Although the reviews are generally positive,[175] these systematic "audits" have the potential to detect instances of bias in the grantmaking process. The certainty that the records will be audited every three years should also serve as a prophylaxis against bias.

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[172] NSF Manual 1, "Administrative Information Manual (ADM)," ch. VIII, §340, updated January 31, 1991.

[173] *Id.*

IV. Peer Review in the Environmental Protection Agency's Office of Exploratory Research

The United States Environmental Protection Agency (EPA) is one of the largest regulatory agencies in the United States with more than 19,000 employees located in its Washington, D.C. Headquarters, its ten regional offices and several research laboratories throughout the country.[176] Unlike NIH and NSF, EPA's functions are primarily regulatory in nature; it writes and enforces standards aimed at protecting and enhancing environmental quality. EPA does, however, have a research mission to learn more about the impacts of human activities on the environment, and it has particular need for research on issues that arise during its standard-setting activities. Although it can never hope to conduct or fund all of the research necessary to provide an adequate scientific basis for its rules and regulations, it attempts to identify in advance particular scientific questions that may arise in future rulemaking initiatives and to conduct research on aspects of those questions to help the regulatory staff decide how to write supportable standards. Most of EPA's research budget is spent on research carried out in its own laboratories, but the agency does have a substantial budget for supporting outside research in universities, corporate laboratories and private consulting companies.[177]

A. Discretionary Grant Programs

Most external EPA-funded research is administered through the agency's Office of Research and Development (ORD), which is headed by an Assistant

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[174] *Id.* §350.

[175] Interview with Mr. James McCullough, Program Evaluation Staff Director, National Science Foundation, Washington, D.C., April 3, 1992.

[176] The primary EPA research laboratories are located in Cincinnati, Ohio and Research Triangle Park, North Carolina. It has smaller laboratories in Las Vegas, Nevada, Ada, Oklahoma, Athens Georgia, Corvallis, Oregon, Duluth, Minnesota, Gulf Breeze, Florida, and Narragansett, Rhode Island. *See* United States Environmental Protection Agency, FY-1991 EPA Research Program Guide 127-29 (1991) [hereinafter cited as 1991 Program Guide].

[177] In 1986, for example, EPA awarded $10.6 million for investigator-initiated research out of a total extramural budget of $217 million for environmental and related research. 1988 AMS Report, *supra* note 91, at D-1.

Administrator who is appointed by the President with the advice and consent of the Senate.[178] That Office is in turn divided into eight Offices, each of which is headed by a career official in the Senior Executive Service.[179] Each of these Offices administers some investigator-initiated discretionary grants, and ORD as a whole funds approximately $40,000,000 per year in research grants.[180] This report will focus on the Office of Exploratory Research (EPA/OER), because it "is the primary contact between the Environmental Protection Agency and the environmental research community" and because it has traditionally relied heavily upon peer review in awarding research grants.[181]

The Office of Exploratory Research (OER) was created "to support research aimed at developing a better basic scientific understanding of the environment and its inherent problems." Its primary objectives are:

> To have the environmental research community aware of and working on problems of interest to EPA;
>
> To promote close interaction and mutual awareness between EPA researchers and the environmental research community; and
>
> To provide general support to the research community for work on fundamental environmental research, thereby promoting a solid foundation of knowledge and a cadre of scientific and technical personnel in the environmental sciences.[182]

Most OER-supported research is fundamental, long-range research aimed at emerging environmental problems or cutting edge research exploring advanced concepts and techniques in the environmental sciences and engineering.[183] OER administers several "core programs," including a Competitive Research Grants (CRG) Program, an Environmental Research Centers Program, a Hazardous Substance Research Centers Program, a Visiting Scientists Program and a Small Business Innovation Research (SBIR) Program.[184] This report will concentrate on the CRG Program and the SBIR Program.

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[178] 40 CFR §1.45. *See* Government Manual at 556.

[179] The eight offices in the Office of Research and Development are: the Office of Technology Transfer and Regulatory Support; the Office of Exploratory Research; the Office of Environmental Engineering and Technology Demonstration; the Office of Health Research; the Office of Environmental Processes and Effects Research; the Office of Modelling, Monitoring Systems and Quality Assurance; the Office of Health Environmental Assessment; and the Office of Research and Program Management. *See* 40 CFR §1.45.

[180] CFDA at 877.

[181] Steven Smith & Steven Klein, Management Study of the Office of Exploratory Research 1 (1990) [hereinafter cited as OER Management Study]. *See* also United States Environmental Protection Agency, Orientation Handbook for Members of Research Grants Science Review Panels 3 (1991) [hereinafter cited as Orientation Handbook]. OER's niche is defined by research objectives and priorities different from those of other federal programs supporting investigator-initiated environmental research. The grant program is interested in research that holds some promise for improving EPA's ability to detect and reduce the impact of environmental pollutants on human health and the environment. The scope of this interest encompasses the transport, transformation, fate, effects, and control of these pollutants. 1988 AMS, *supra* note 91, Report at 15.

[182] United States Environmental Protection Agency, FY 1989 Annual Report of the Research Grants Program 1 (1990) [hereinafter cited as 1989 Annual Report].

The major functions of the CRG Program are "to manage a program of long-range research through grants to qualified investigators and to operate a system of peer review for competitively selecting and awarding projects."[185] The CRG Program funds research in a broad range of areas including identification and characterization of hazardous substances, intermedia transport of pollutants, pollutant fate in all media, human and ecological risk assessment, incineration, waste reduction, and wastewater treatment.[186] Examples of CRG Program-funded research include studies aimed at exploring the relationship between solar ultraviolet radiation and skin melanomas, determining the effects of environmental stressors, and studying the pathology of trees exposed to air pollution.[187]

There are two vehicles for funding investigator-initiated research in the CRG Program: (1) researchers can respond to a general annual solicitation for research proposals in six broad areas of environmental research; and (2) researchers can respond to special solicitations for highly defined research in particular areas called "Requests for Applications" (RFAs).[188] The RFA is a vehicle for soliciting "a one-time competition in a well defined high priority research area."[189] In FY 1989, CGR Program funded 62 new grants and administered 152 active grants for a total of about $18,000,000. An average grant award was for two and one-half years at a level of about $100,000 per year.[190] The program has sufficient funds for only about one-sixth of the applications that it receives.[191]

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[183] OER Management Study, *supra* note 181, at 2.

[184] 1991 Program Guide, *supra* note 176, at 112-13. OER also administers a manpower training program and a workforce development program that are not directly related to funded research. *See* OER Management Study, *supra* note 181, at 1.

[185] United States Environmental Protection Agency, Research Grants Program Annual Report FY 1988 (1989).

[186] 1989 Annual Report, *supra* note 182, at 1; AMS, *supra* note 91, Report at 15 ("Some academic scientists interviewed for this evaluation think of OER's program as the midway point on a continuum between basic science and applied science—between NSF and NIH on one hand and the EPA labs on the other.")

[187] OER Management Study, *supra* note 181, at 2.

[188] 1989 Annual Report, *supra* note 182, at 1; OER Management Study, *supra* note 181, at 2.

[189] 1989 Annual Report, *supra* note 182, at 1.

[190] 1989 Annual Report, *supra* note 182, at 1-5.

[191] OER Management Study, *supra* note 181, at 2-3. The AMS Report suggests that the funding rate is closer to one-third. AMS Report, *supra* note 177, at 22. If this is true, the competition is not unusually stiff.

The SBIR Program supports innovative research with potential practical applications. EPA's SBIR awards are made through contracts, rather than grants, but the agency uses the same procedural approach to peer review in both programs. EPA devotes about $3 million per year to about 25 Phase I and 12 Phase II SBIR awards.[192] As the figures indicate, about half of the Phase I awards receive Phase II funding.[193] Phase I awards are limited to the statutory maximum of $50,000; phase II awards are limited by EPA to $150,000.[194] Competition is very stiff; in FY 1990, only 32 out of 435 Phase I applications were funded. The program currently focuses primarily upon pollution control technology and instrumentation research[195] Examples of SBIR-funded research include a project on innovative incineration technology for the fiberglass industry; a study of microbial removal of organic sulfur from coal; and an examination of novel sensors for metal-ion detection and quantification.[196]

B. Criteria for Awarding Grants

The broad criteria for evaluating research proposals are as follows:

> A proposal is judged for (a) scientific merit in terms of: (1) strengths and weaknesses of the project; (2) adequacy of overall project design; (3) competency of proposed staff; (4) suitability of applicant's available resources; (5) appropriateness of the proposed project period and budget; and (6) probability that the project will accomplish stated objectives; and for (b) program interest in terms of: (1) the need for the proposed research; and (2) relationship to objective(s) in an approved work plan.[197]

These criteria do not vary greatly from those used to evaluate the scientific merit of proposals in NIH.

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[192] OER Management Study, *supra* note 181, at 6.

[193] United States Environmental Protection Agency, Small Business Innovation Research Program 2 (1990) [hereinafter cited as SBIR Program].

[194] *Id.* at 2.

[195] Id, at 6-7; OER Management Study, *supra* note 181,at 6.

[196] SBIR Program, Abstracts of Phase I and Phase II Awards (1989).

[197] CFDA at 878. The agency's guide for peer reviewers provides that reviewers should "focus attention on the scientific merits and utility or potential utility of research proposals, the competence of the principal investigator and the adequacy of institutional facilities." Orientation Handbook, *supra* note 181, at 2.

C. Procedures for Awarding Grants

The grants selection process at EPA/OER consists of a "dual system of review" that relies heavily upon six "Science Review Panels" established on an ad hoc basis in each of the program's six principal areas of interest.[198] EPA/OER enters into a cooperative agreement with each Panel Chair, an outside scientist or engineer appointed to a single three-year term by the Assistant Administrator for Research and Development, to supervise the peer review process. The chairperson is responsible for selecting the members of the panel, overseeing the panel's scientific review of the applications assigned to it, and providing EPA/OER staff with a Summary Statement of the panel's recommendations for each application. With the approval of the EPA/OER staff, the chairperson chooses 20-60 members for the panel from among recognized experts in the relevant field. Panelists are compensated at the rate of $200 per day or fraction of a day plus transportation and per diem expenses. An EPA/OER staffer called a "Science Review Administrator" (SRA), is an ex-officio member of the panel. The SRA's functions are to provide policy and procedural guidance and managerial assistance.[199]

All grant applications are initially referred to the agency's Grants Administration Division where they are reviewed for legal and administrative acceptability. They are then given to the Research Grants Program for assignment to the appropriate peer review panel. Once assigned to a panel, the Chairperson reviews them with the assistance of the SRA and assigns each one to at least three panel members who serve as "primary reviewers" of that application. The Chairperson attempts to ensure that no panel member is the primary reviewer for more than five applications per cycle. If a reviewer believes that an application has been inappropriately assigned to him or her, it may be returned to the Chairperson and reassigned. Each primary reviewer evaluates the applications in accordance with the listed criteria and prepares a written evaluation with an accompanying recommendation to approve, disapprove or defer the proposal.[200] All panelists are sent the cover sheets and abstracts of all applications that will be considered at the upcoming meeting, and any member may request a copy of the full proposal for any application in advance of the meeting.

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[198] The six principle areas of interest are: chemistry and physics of water, chemistry and physics of air, engineering, biology, health, and socio/economic studies.

[199] Orientation Handbook, *supra* note 181, at 1. The Chairperson is supposed to make every effort to provide for representative geographic distribution and minority group representation on the panels.

[200] *Id.* at 2-3.

Depending upon the workload and the availability of funds, panel meetings are scheduled two or three times per year. The panel's consideration of each application begins with a review of the written evaluations and recommendations prepared by the three primary reviewers. A full panel discussion follows until the proposal's strengths and weaknesses have been fully aired. After the discussion on an application is completed, each panelist "independently and privately" records a numerical priority score ranging from 0 to 100 that reflects the level of scientific merit of the application.[201] The staff then ranks the proposals according to score. The panel may not recommend for funding any proposal with an average score of less than 60, and all proposals with an average score of greater than 60 receive an automatic recommendation. The Chairman, with the assistance of the SRA, prepares a "Summary Statement" setting out the panel's recommendation and the reasons therefore. EPA/OER staff give the "highest consideration" to the top two to four applications for each panel. The remainder are "selected in part, on criteria other than technical merit and utility, such as program balance and budget."[202]

Because of the very high volume of Phase I SBIR proposals, EPA/OER has developed a procedure for prescreening applications to cull out clearly substandard proposals and to reduce the volume of proposals to a manageable level. After sorting out the incoming proposals, the SBIR Program Manager calls in other EPA/OER staffers and 10 outside reviewers from the relevant panel for two days of culling. The SBIR Program Manager reads all of the proposals, and each outside reviewer reads a large group of proposals assigned to him or her. Each outside reviewer assigns scores and writes up brief explanations for all of the proposals assigned to that reviewer, but the reviewer does not read or discuss the proposals assigned to the other reviewers. Thus, instead of considering all of the incoming applications, each of the ten outside reviewers only considers about ten percent. The SBIR Program Manager writes Summary Statements for all of the incoming proposals. On the basis of the scores, the SRA selects 50-70 proposals for the full three-person and full committee review described above.

Grant applications, review materials, and proceedings of panel meetings are considered confidential. EPA/OER's procedures strictly forbid any communications concerning an application between members of the panel and applicants. All communications and inquiries must be channeled through the SRA or the SBIR Program Manager. In addition, the agency's Orientation Handbook for panelists speaks particularly to the issue of trade secrecy, providing that:

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[201] *Id.* at 3.

[202] *Id.* at 3-4. *See also* 1988 AMS Report, *supra* note 91.

> Panel members are also bound by the confidentiality of all proprietary parts of the proposals they read under this guidance; no panelists will disclose or use to their own advantage any data, concept, research protocol, or any other idea included in the applications.[203]

Although the Orientation Handbook is curiously silent about the confidentiality of the reviewers' identities, EPA/OER's policy is to never divulge the names of primary reviewers to anyone, including rejected applicants. No attempt is made, however, to keep the attendance list for particular panel meetings secret.[204] Thus, while a rejected applicant cannot ascertain the identities of the three persons who reviewed his or her proposal, a persistent applicant can find out who probably sat on the panel that evaluated the proposal.

The Orientation Handbook also speaks to the agency's Privacy Act obligations.[205] Immediately following a panel meeting, all applicants who "failed" the review receive a rejection letter. Those whose applications "passed" the technical review receive a letter informing them of that fact and telling them that their applications are under consideration by the EPA/OER staff. After the final funding decisions have been made, those candidates not selected receive a second letter informing them of that fact. Five or six weeks after this, every applicant receives the Summary Statement that consists of the Chairman's summary of the panel's technical review of the application.[206] The Summary Statement is regarded as confidential and is provided only to the applicant. Applicants are later allowed access to all documents generated during the review of their grant applications, including the reviewers' written comments, if available. "Reviewers' written comments and scores, however, are not retained after their substance has been incorporated into Summary Statements."[207]

EPA/OER's conflict of interest requirements provide that no panelist may attend a panel meeting in which his or her own grant application or the application of a close relative, friend or close professional associate is evaluated. A panelist may attend a meeting at which an application from his or her own institution is considered, but must leave the room during the consideration of that application.[208]

Although EPA/OER has no formal procedures for challenging the agency's funding decision, it has established a formal appeals process under which rejected applicants may appeal the failure to correct any factual errors manifested in the Summary Statements or other documents in the applicant's file.[209] According to EPA/OER staffers, disgruntled applicants are rare. When a rejected applicant asks the relevant SRA why his or her proposal was rejected or attempts to challenge the agency's decision, the SRA typically suggests that the proposal be resubmitted for consideration during the next funding cycle. The resubmittal will be considered by the same panel, which normally contains about 50-60 percent of the people who reviewed the original panel.

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[203] Orientation Handbook, *supra* note 181 at 5.

[204] Comments of Mr. Robert A. Papetti, Director, Research Grants Staff, Office of Research and Development, EPA on an earlier draft of this Report, August 28, 1991.

[205] EPA also has promulgated procedural regulations implementing the Privacy Act. 40 CFR pt. 16.

[206] Comments of Mr. Robert A. Papetti, *supra* note 204.

[207] Orientation Handbook, *supra* note 181, at 5.

[208] *Id.* at 1.

D. The Process in Operation

EPA/OER's research grant process relies heavily upon peer review. Outsiders choose the peer reviewers, manage the peer review meetings, and evaluate and rank the proposals. Although the ultimate funding decisions are made by EPA/OER staffers, they rarely depart from the panel recommendations. According to one outside management review of EPA/OER's funding process, "[a] combination of tailored review groups, longer-than-average discussion time, and stringent criteria produces a very rigorous screening of proposals on the basis of scientific merit."[210] As with the other programs examined in this report, however, the process in EPA/OER does not always operate in practice exactly as described on paper.

1. Feedback and Rebuttal

EPA's Privacy Act regulations appear on the surface to provide quite a bit of feedback to rejected applicants. In theory, applicants may see all documents generated during the review of their grant applications, including site visit reports, Summary Statements, and reviewers' written comments, but only if they are still available when the request is made. Because all the written documentation is discarded after the Summary Statement is drafted, as a practical matter applicants cannot secure verbatim copies of reviewers' written comments, and they never see their scores.[211]

2. Favoritism

EPA/OER attempts to avoid favoritism, animus and conflicts of interest by setting aside a period of time at the first of each panel session for a discussion among the panelists of these issues with respect to the pending applications. Since the panelists tend to be well-established university research scientists with substantial teaching careers, the discussion often focuses on proposals from their former students. The agency has adopted a rough rule of thumb that a panelist need not recuse himself from the consideration of proposals from former undergraduate students or from former graduate students who have not graduated within the last five years.

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[209] 40 CFR §16.9.

[210] 1988 AMS Report, *supra* note 91, at 22.

[211] Comments of Dr. Robert A. Papetti, *supra* note 204.

3. Old Boy Network

EPA/OER officials acknowledge that the history of discretionary research grants in EPA is not inspiring. Prior to the establishment of the Office of Exploratory Research in 1980, research grants were awarded by EPA staff in an ad hoc fashion.[212] The system was a prototypical good old boy network in which agency staffers awarded grants to their favorite principal investigators with little regard to the peer review that was conducted and little threat of subsequent evaluation. As a consequence, the agency's reputation as a research institution suffered, and a task force within ORD was created to establish a more effective peer review system for awarding grants.

The peer review system was barely underway, however, when the recently appointed Assistant Administrator for Research and Development began to abuse it. In one of the lower profile contretemps of the Gorsuch Administration at EPA, Assistant Administrator Andrew Jovanovich was accused of steering grants to one of his former business associates outside of the peer review process. According to a report by the agency's Inspector General, a Massachusetts Institute of Technology researcher, Ronald Probstein, met personally with Jovanovich after his grant proposal to study water treatment technology was rejected by one of the recently formed peer review panels. Jovanovich had previously supervised Probstein's work at a private research institute. After Probstein angrily denounced the panel's decision and complained that he would have to lay off several graduate students, Jovanovich interceded with the lower-level staff and demanded that Probstein's proposal be reviewed by another peer review panel containing only two members, one of whom would be selected by Jovanovich and the other by Probstein. Not surprisingly, the new panel was effusive in its praise of the proposal, and a $77,000 grant was awarded. Jovanovich explained that lower level EPA grants officials were "very poor at selecting the right work," but the Inspector General found that "allowing a scientist to select his own peer reviewer, especially one he has previously worked with, lacks any appearance of independence or objectivity...and would leave EPA open to charges of cronyism."[213] Later, Jovanovich's appointment as Assistant

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[212] *See* M. Landy, M. Roberts & S. Thomas, The Environmental Protection Agency 50 (1990).

[213] Howie Kurtz, *EPA Research Chief Violated Contract Award Rules, Probe Finds*, Washington Post, April 10, 1982, A3.

Administrator for Research and Development was withdrawn, and he was reassigned to a low-level agency post.

In the intervening years since the Jovanovich incident, there have been no further charges of impropriety at high levels in the Office of Research and Development, and the extensive peer review process for awarding grants in OER has apparently proceeded without substantial interruptions from high levels. Although the program is no longer criticized for cronyism, it is still possible for the Panel Chair to select panel members from among a fairly narrow cut of researchers who are familiar with one another's work and who have similar views about how research ought to be done. The Director of the Research Grants Staff, however, reported that he had no reason to believe that the Chairpersons behave this way, and he pointed out that one of the functions of the SRA is to ensure that they do not function as old boy networks. SRAs are told to insist that panel membership reflect a diversity of specializations, talents, and points of view. Since the SRA must ultimately concur in the Chairperson's selection of panel members, they have the power to police the system against "old boyism."[214]

A further hedge against old boyism is inherent in the very nature of the program. Because of budgetary and personnel limitations, EPA/OER can only assemble six panels to review proposals coming from all areas of environmental research.[215] Since EPA must of necessity recruit experts from widely divergent fields, there is less risk of any particular panel becoming dominated by a group of panelists hewing to a narrow view of proper science and legitimate scientific subjects.

4. Halo Effect

EPA/OER staffers are ambivalent about the "halo effect." One SRA said that he did not believe that the halo effect seriously affected the process at EPA/OER, noting that: "We've shot down many big names." Another SRA noted that many successfully funded applicants are funded very frequently, and suggested that: "There are some applicants with more clout than others." He opined that "a former [Panel] chairman may pull some weight." Yet the fact that during the years 1986-90 a total of 281 awards were made to a total of 135 institutions, no one of which received more than 4.5 percent of the total funds awarded suggests that the money is spread around fairly evenly.[216]

Established researchers have a much better chance of obtaining funding from EPA/OER than "youngsters" who are new to the system. One EPA/OER staffer noted that because of the intense competition for grants, it is often very difficult for a new researcher to obtain funding. Given a very limited pool of resources, the senior scientists on the panels no doubt tend to recommend funding for proposals from other well-established researchers, because they are more likely to yield useful results than those of novices. No special effort is made to direct resources to younger researchers just entering the field. The overall result may be that discouraged newcomers opt out of the system and pursue research in other areas or with other funding agencies.

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[214] Comments of Mr. Robert A. Papetti, *supra* note 204.

[215] *Id.* By comparison, EPA/OER convenes only one panel on human health, while NIH has over 100 study sections devoted to that topic. *Id.*

[216] *Id.*

5. Personal Animus

At the first of every panel meeting, panelists are provided an opportunity to identify proposals from researchers about whom the panelists have strongly negative views. On one occasion early in the history of the program, a panelist expressed a strong personal dislike of an applicant, and he was happy to be relieved of the obligation of participating in the consideration of that applicant's proposal. This approach, of course, relies entirely upon the candor of the panelists in identifying any animus that they might harbor toward particular applicants. Perhaps not surprisingly, this happens only very rarely.[217]

6. Mavericks

As in NIH and NSF, peer review committees in EPA/OER tend to look unfavorably upon maverick proposals that reject the conventional wisdom of the research community. According to one EPA/OER staffer, "Panels are basically very conservative and want to have some assurance of success. They are not inclined to fund way-out proposals." The staff, however, makes a special effort to ensure that unusual, but innovative proposals are fairly considered. The difficulty, of course, lies in distinguishing an innovative but promising proposal from a quirky idea that has no chance for success. According to the Director of the Research Grants Staff:

> It is our impression that many of the proposals received (particularly in the SBIR program) are not the productions of inventive genius not recognized in its time, but inoperable schemes, reinventions of old ideas, and theories which violate basic principles of physics, chemistry, etc. The authors of these proposals may well be viewed as mavericks fighting against the weight of conventional scientific opinion, but they are precisely the reason why we use technical and scientific peer panels to

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[217] *Id.*

> review proposals and recommend for or against support by EPA.[218]

7. Tunnel Vision

Since the Panel Chair is responsible for selecting the panel members, it is entirely possible that the committee will be composed of a homogeneous group of mainline scientists who share the Chairperson's views about the relevant scientific questions. This can lead to tunnel vision. EPA/OER formally attempts to reduce this possibility by insisting that Panel Chairs step down at the end of the three-year terms, but in many cases the terms have been extended informally to four or more years.

8. Applicant Anonymity

EPA/OER does not attempt to keep the names and institutions of the applicants from the panel members.

9. Reviewer Anonymity

Although EPA/OER is very careful about maintaining the confidentiality of the panel proceedings, nothing in EPA/OER's Orientation Handbook for panelists suggests that the names of the panelists should not be revealed to applicants. Although the agency has a strict policy against revealing the names of the three primary reviewers to applicants, the attendance list for particular panel meetings is publicly available. Hence, a persistent applicant can ascertain the identities of the members of the panel that probably considered his or her application, but cannot ascertain the identities of the three panelists who conducted the intensive reviews of his or her proposal.

10. Financial Conflict of Interest

The EPA/OER guidelines parallel the NIH guidelines on financial conflict of interest. No panelist may participate in a panel meeting that evaluates his or her own grant application or the application of a close relative, friend or close professional associate, and panel members must absent themselves from meetings when applications from their own institutions are considered. There is one significant difference, however, that is inherent in the limited number of panels available for reviewing applications at EPA/OER. In NIH, the proposal of a study section member or close relative or associate will go to an entirely separate panel, and if an appropriate panel with sufficient expertise does not exist, an ad hoc panel will be created. In EPA/OER, a panelist's application goes to his or her panel, but the applicant is not invited to the meeting in which that proposal is considered.

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[218] *Id.*

Although this procedure shields the decisionmaking process from overt participation by the panelist/applicant, the remaining panelists know at the time that they evaluate a fellow panelist's proposal that they will have to work with that panelist in the future. This may inspire them to view the proposal favorably. Even though the scores are always kept confidential, a panel member whose proposal is rejected knows that at least some of the other panelists panned it. Moreover, to the extent that other panelists are also potential applicants, they may view the proposal favorably in the hope that the panelist/applicant will reciprocate. While proposals from panel members do get turned down, this arrangement does nothing to dispel the suspicion that the granting process is an old boy network in which friends in powerful positions help each other out.[219]

11. Research Conflict of Interest

Like the NIH guidelines, the EPA/OER guidelines do not prevent reviewers from judging the applications of direct competitors. EPA/OER's Orientation Handbook for panelists does, however, speak obliquely to one aspect of research conflict of interest. Addressing the issue of confidentiality, the Handbook provides that "no panelists will disclose or use to their own advantage any data, concept, research protocol, or any other idea included in the applications."[220] This provision may be broadly construed to prevent a researcher from using information obtained during the review process to his or her own advantage in his or her own research, whether or not there is a potential for financial gain. In both instances, however, the agency has declined to adopt the prophylactic approach that is normally used to address conflicts of interest—viz. recusal from the decisionmaking body in which the conflict of interest might arise.[221]

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[219] *See* Part 5. In a response to an earlier draft of this Report, the Director of EPA's Research Grants Staff noted that EPA's panels differ from those of NIH in that they are not standing committees with fixed memberships. Because EPA's panels are assembled ad hoc from an informal list of technically proficient people who have agreed to serve as panelists. In this more fluid context, subtle quids pro quo are not as easily arranged. In addition, because EPA's strict division of disciplines among its panels arguably precludes sending a panelist's proposal to another panel. Unlike NIH, there are no closely related panels with the technical capacity to evaluate the proposal of an applicant who is a member of a different panel. Comments of Mr. Robert A. Papetti, *supra* note 204.

One solution to this dilemma is simply to preclude all applicants from sitting on any panels. Since the agency has available to it a list of possible panelists and since a panelist need serve for only a single round of evaluations, it should be easy enough to assemble a panel out of persons who do not have an application currently pending before EPA. Moreover, since each panel draws on expertise in a broad range of disciplines, the universe of potential panelists is no doubt fairly large.

[220] Orientation Handbook *supra* note 181, at 5.

12. Peremptory Challenges

EPA/OER makes no provision for challenges from applicants to the participation of certain individuals in the agency's evaluation of their proposals. Since each funding program has only a single very large peer review committee, a true peremptory challenge in which the challenged reviewer plays no role whatsoever in the evaluation of the challenger's proposal or any competing proposals would probably be very difficult to implement. The agency, however, could relatively easily implement a modified peremptory challenge under which the challenged individual would not be allowed to participate in the discussion or scoring of the challenger's application. The potential for animus would, in other words, be treated exactly the same as the potential for favoritism that arises when the panel considers an application from the reviewer's own institution.[222]

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[221] In a response to an earlier draft of this Report, the Director of EPA's Research Grants Staff noted that:

> Whenever anybody who is proficient in a technical subject area reviews work of another person proficient in the same or closely allied area then a potential conflict exists since both are competitors for ideas in the same technical field. There is no way out of this short of assigning an unqualified reviewer to judge the proposal.

Comments of Mr. Robert A. Papetti, *supra* note 204. The validity of this argument depends upon how one defines a "qualified" reviewer. If the universe of qualified reviewers consists exclusively of those persons who can understand every technical nuance of a proposal, then the argument may be correct. If, however, the universe includes persons with a strong grounding in science who practice in a related field, then the argument has less validity.

[222] In a response to an earlier draft of this Report, the Director of EPA's Research Grants Staff suggested that even modified peremptory challenges would be inappropriate in EPA's programs for three reasons:

> First of all, it appears that such a procedure could provide a way for applicants to influence the review of their own proposals by challenging the most competent and incisive reviewers. Second, we believe that implementing a peremptory challenge procedure would result in challenges from so many applicants that it would be difficult for us to follow through. Finally, our system in which there are three primary reviewers among twenty to forty panel members tends to remove the impact of outlying votes.

Comments of Mr. Robert A. Papetti, *supra* note 204. The first objection is a troubling one, because it suggests that a savvy applicant could "game" the system by exercising peremptory challenges against the most critical reviewers, leaving them available to criticize competing proposals. If the pool of potential reviewers is very small, this could constitute sufficient reason to deny peremptory challenges. The potential for abuse, however, should be greatly reduced by making the applicant explain his or her reasons for challenging a potential reviewer.

The second objections are of less concern. It would take very limited staff time to follow through on peremptory challenges, even if it involved reading and evaluating two or three challenges from each applicant. In practice, the vast majority of applicants will probably decline to exercise any peremptory challenges, and the others can be evaluated in relatively short order. Assigning the primary reviewing role to three of the 20 or so panelists does not solve the problem that peremptory challenges are supposed to solve, and may in fact exacerbate it. An applicant who is concerned that a panelist might harbor animus

13. Lobbying

Despite EPA's history of direct intervention by high-level EPA officials, EPA/OER staffers reported no instances in recent years of applicants' lobbying upper-level EPA staff. The embarrassing experience of Dr. Jovanovich may still be fresh in the minds of upper-level EPA officials and potential "lobbyists."

14. Political Pressure

EPA/OER staffers frequently receive letters from congresspersons in support of particular research applications. These are included in the applicants' files and are considered by the panels. EPA/OER staffers never overturn panel recommendations on the basis of such letters. In fact, the letters slightly annoy EPA/OER staffers, because EPA/OER procedures require a response within a limited period of time, and this takes time out of their already busy schedules.

15. Efficacy of Appeal Procedures

EPA has established a formal appeals procedure for rejected applicants. Each Project Officer must designate a "Disputes Decision Official," from among senior EPA employees who are knowledgeable about EPA's assistance programs, to review and resolve disputes over grant applications and rejections. After consulting informally with the relevant persons, the Disputes Decision Official issues a written decision from which the applicant may take an appeal to the appropriate EPA Assistant Administrator. Any appeal must be accompanied by documentary evidence and briefs. Applicants may be represented by counsel in such appeals. The Assistant Administrator's written decision constitutes the final agency action, and the applicant may then appeal to a court.[223]

Although a rejected applicant has a right to demand an informal hearing, this happens only very rarely. One staffer asserted that complaints occur only "once in a blue moon," and another reported a "very, very low bitch rate." When complaints do occur, the SRA's typically advise the rejected applicants to revise and resubmit their proposals. None of the staffers interviewed for this report could remember a case in which a rejected applicant successfully went over the head of the SRA to the upper-level management in the Office of Research and Development or the Office of the Administrator.

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against him or his institution is not likely to be assuaged by the assurance that the likelihood is small that that panelist will be among the three primary reviewers. If the panelist really harbors animus, then he or she will attempt to become a primary panelist for that proposal, and if that maneuver is successful, his or her animus could play a very large role indeed in the evaluation of the application.

[223] United States Environmental Protection Agency, Assistance Administration Manual 35-1 (1984). Somewhat more formal procedures are applicable to rejected applicants for SBIR grants, because EPA administers such grants as contracts subject to the Federal Acquisition Regulations. Comments of Mr. Robert A. Papetti, *supra* note 204.

V. Peer Review in the National Endowment for the Arts

The National Endowment for the Arts (NEA) is part of the National Foundation on the Arts and the Humanities, which was created as an independent agency by the National Foundation on the Arts and the Humanities Act of 1965.[224] Its mission is to "foster the excellence, diversity and vitality of the arts in the United States," and to "help broaden the availability and appreciation of such excellence, diversity and vitality," without "impos[ing] a single aesthetic standard or attempt[ing] to direct artistic content."[225] NEA is an essential part of a relatively brief tradition of government patronage of the arts dating back to the New Deal's Works Progress Administration.[226] Since its creation in 1965, NEA's budget has mushroomed from about $2.5 million to $174 million in FY 1991.[227] By almost any measure, NEA has been enormously successful in fostering the fine arts in the United States. On its twentieth anniversary in 1985, NEA received an Oscar for "its dedicated commitment to fostering artistic and creative activity and excellence of human genius."[228] The inevitable tensions inherent in its goals, however, have frequently placed the agency in the public spotlight where, perhaps to a greater degree than the scientific agencies, the pros and cons of peer review have been extensively debated.

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[224] 20 USC §951, et seq.

[225] National Endowment for the Arts, Guide to the National Endowment for the Arts 2 (1990) [hereinafter cited as NEA Guide]. According to the NEA Statement of Mission, NEA activities are designed to:

> Demonstrate national recognition of the importance of artistic excellence;
> Provide opportunities for artists to develop their talents;
> Assist in the creation, production, presentation/exhibition of innovative and diverse work that has potential to affect the art form and directly or indirectly result over time in new art of permanent value;
> Assure the preservation of our cultural heritage;
> Increase the performance, exhibition and transmission of art to all people throughout the nation;
> Deepen understanding and appreciation of the arts among all people nationwide;
> Encourage serious and meaningful art programs as part of basic education;
> Stimulate increasing levels of nonfederal support of the arts;
> Improve the institutional capacity of the best of our arts organizations to develop, produce, present, and exhibit bold and varied fare; and
> Provide information about the arts, their artistic and financial health and the state of their audiences.

[226] *See* William J. Lanquette, *The Federal Government—The Patron Saint of the Arts*, 10 NATIONAL JOURNAL 1288 (Aug. 12, 1978);

[227] Comments of Michael McLaughlin, Senior Staff Assistant, Office of the Deputy Chairman for Programs and Ana Steele, Associate Deputy Chairman for Programs on an earlier draft of this report, September 17, 1991. *See also* Lanquette, *supra* note 226.

[228] *National Endowments for the Arts is Honored as 20th Birthday Nears*, N.Y. Times, Sept. 1, 1985, sec. 1, pt. 2, p. 68, col. 1.

NEA fulfills its mission primarily by awarding discretionary grants to individual artists and nonprofit artistic organizations through peer reviewed competitions. Because awards to organizations must generally be matched from some other source, the agency can serve as "a catalyst to promote the continuing diversity, vitality and excellence in the arts in America and to provide access to, and appreciation of, such diversity, excellence and vitality."[229] In fiscal year 1989, NEA funded 4,458 of 17,879 grant applications for a total of $153 million. Individual artists received 7.6 percent of the monies, and the remainder went to organizations with matching grants. Almost 90 percent of the grants were for less than $50,000.[230]

The National Council on the Arts, composed of the NEA Chairman and 26 other members appointed by the President with the advice and consent of the Senate, advises the Chairman with respect to policies programs and procedures, reviews applications for financial support, and makes recommendations on funding decisions. Its function is therefore very much like the Advisory Councils in NIH upon which it is apparently modeled. Its members must be citizens who "(a) are widely recognized for their knowledge of, or expertise in, or for their profound interest in, the arts and (b) have established records of distinguished service, or achieved eminence, in the arts."[231] As the agency has expanded the range of artistic areas that it is prepared to support, the Council has become less involved in advising the Chairman with respect to individual grants and has played a broader advisory role with respect to more important policy issues.[232]

A. Discretionary Grant Programs

Like NIH and NSF, NEA has major funding programs in several broad areas, including Dance, Design Arts, Folk Arts, Literature, Media Arts (Film/Radio/Television), Museums, Music, Theater and Visual Arts, and Challenge and Advancement Grants. Because the agency is only able to fund about 25 percent of the applications that come before it, the competition in all of the programs is fairly stiff. This report will focus primarily upon the programs in Music, Visual Arts and Challenge Grants.

1. Music

The Music Program awards grants to assist exceptionally talented individuals and a wide range of organizations including professional symphony orchestras, contemporary music ensembles, jazz groups, national service organizations, choruses, chamber music ensembles, music festivals, and others. Funds are not available, however, for capital expenditures such as the construction or rehabilitation of facilities, summer music camps, publication costs, and purchase of musical instruments or uniforms.[233] The program awards about $15,500,000 to about 800 successful recipients from a pool of around 1800 applications. Grants for individuals range from $2,000 to $25,000; grants for organizations range from $3,000 to $286,000. Grants are awarded to support "the creation and performance of music, with an emphasis on assisting the growth of American music and musicians."[234] Examples of such grants include funding for a summer music festival, assisting an orchestra to include contemporary and American works in its repertoire, supporting a fellowship to compose a work for string orchestra and chorus, and supporting regional touring jazz clinics.[235]

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[229] NEA Guide, *supra* note 225, at 2.

[230] National Endowment for the Arts, Facts about the Arts Endowment (1990).

[231] NEA Guide, *supra* note 225, at 3.

[232] The Independent Commission on the National Endowment for the Arts, A Report to Congress on the National Endowment for the Arts 24 (1990).

2. Visual Arts

The Visual Arts Program awards grants to "individuals of exceptional talent working in a wide range of styles and media," including painting, sculpture, photography, crafts, printmaking, drawing, artists books, video, performance art, conceptual art, and new genres. Awards to organizations are intended to "encourage individual visual artists' development and experimentation." The Program also supports "dialogue between visual artists and the public."[236] The Program awards about $6 million in relatively small fellowships and grants. Individual fellowships and grants are awarded at levels of either $15,000 or $20,000, and organization matching grants range from $5,000 to $50,000. Out of about 5500 applicants, the Program makes approximately 450 awards, a success rate of only around eight percent.[237] The Visual Arts Program is subdivided into three major categories. About $3 million of the budget is devoted to about 200-250 individual fellowships. Less than five percent of the 5000 applications are funded. In the second category, NEA awards about $2 million per year to visual artists' organizations; about one-half of the 200 applicants are funded. The third category consists of visual artist forums and art in public places. About $700,000 is devoted to funding about 60 grants out of around 75 applications. Around $200,000 is left over for special projects. Examples of funded projects include: support for commissions for artists to create a permanent installation at a convention center, support for production of a series of videotapes on fine art lithography, and support for a series of lectures on art practice and critical writing by visual arts professionals from diverse professional and cultural backgrounds.[238] Other, more notorious, examples of projects funded by the Visual Arts Program, such as the Mapplethorpe and Serrano exhibitions, will be discussed in more detail in this Part.

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[233] CDFA at 746.

[234] NEA Guide, *supra* note 225, at 35.

[235] CFDA at 747.

[236] NEA Guide, *supra* note 225, at 53.

[237] CFDA at 750-51.

3. Challenge Grants

The Challenge Program was created to advance the arts over the long-term and thereby to complement the work of the other programs by "offering major one-time grants for activities that look beyond current needs and programming." The overall goal of stimulating long-term public and private investment in the arts is accomplished by requiring that grants be matched on at least a three-to-one basis. Challenge III grants are intended to assist institutions (including arts institutions, State and local arts agencies, regional organizations and others) to undertake new or substantially augmented projects that meet one or more of the following objectives:

> (1) Artistry: to assist nationally significant artistic achievement of the highest quality in one or more of the art forms;
>
> (2) Access: to assist improved and broader access to the arts of quality;
>
> (3) Appreciation: to assist deeper and broader education in and appreciation of the arts of the highest quality;
>
> (4) Nonfederal support: to assist nonfederal public and private support systems for the arts to address any, or a combination of, the above objectives.

During its earlier history (Challenge I and Challenge II), the Program attempted to increase the financial stability of existing arts institutions. Challenge III has the more ambitious objective of supporting "projects designed to have a lasting impact that can help move the Nation forward in achieving excellence in the arts, access to, and/or appreciation of such excellence."[239]

Like the SBIR Programs in the scientific agencies, Challenge III awards have two phases. During the first phase, NEA supports up to 50 arts organizations for an intensive one-year planning process during which NEA provides financial and technical assistance in drafting a long-range plan. Organizations that complete Phase I may apply for large grants to help implement the strategies identified in the long-range plans. With a budget of about $18 million, the Program supports about 25 out of 120 applications with grants that range from $50,000 to $1,000,000 apiece and average around $400,000.[240] One example of a funded project is a $300,000 Challenge III Grant to the New England Foundation for the Arts to increase support for and provide access to outstanding talent in contemporary and folk arts through the creation of two new presenter networks: the Contemporary Arts Network and the Traditional Arts Network.[241]

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[238] CFDA at 751.

[239] NEA Guide, *supra* note 225, at 63; CFDA at 754.

B. Criteria for Awarding Grants

The agency's statute provides some broad criteria for awarding grants. Grants are to be made to individuals "of exceptional talent engaged in or concerned with the arts" for the purpose of supporting projects and productions with "substantial national or international artistic and cultural significance," and that meet "professional standards or standards of authenticity or tradition, regardless of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable...."[242] In awarding grants, the agency is to give emphasis to "American creativity and cultural diversity and to the maintenance and encouragement of professional excellence."[243]

Grants in the Music and Visual Arts Programs are made to individuals and nonprofit organizations on the basis of three broad criteria: artistic quality, the project's merit, and the applicant's capacity to accomplish the project. The criteria for awarding Challenge III grants include the above criteria plus "fundraising capability, impact, readiness, and ability to sustain performance."[244] Each funding category within each Program has its own detailed "review criteria" that are articulated in annual application guidelines. Although there is a good deal of variance across the categories within a Program, there are also many similarities. For example, the criteria in the Music Program for the "Choruses" category are first, and most importantly, "[t]he quality of the chorus' performance as demonstrated by the sample cassette" that must be submitted with the application. For those applicants that pass this review, the reviewers consider:

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[240] CFDA at 755,

[241] CFDA at 755.

[242] 45 USC §954(c)(1), (2).

[243] 45 USC §954(c)(1).

In making grants, the chairman, with the advice of the grant advisory panels and the National Council was to consider, among other factors, artistic and cultural significance, standards of professional excellence, and the development of appreciation and enjoyment of the arts by citizens. Congress has also, over time, added other considerations, such as reaching and reflecting the culture of minority, inner city, rural or tribal communities.

The Independent Commission on the National Endowment for the Arts, *supra* note 232.

[244] CFDA at 755.

- Quality of repertory and commitment to American works.
- Merit of the project and the applicant's ability to accomplish the project.
- Quality of management (including fiscal responsibility and evidence of earned and contributed income where appropriate).
- Educational outreach activities and efforts to involve minorities and special constituencies in regard to audiences, artists, and repertory.[245]

The criteria for "Visual Artists Organizations" in the Visual Arts Program are:

- Quality of artists' work as demonstrated by visual documentation of recent and proposed programs.
- Quality, innovation, and timeliness of current and proposed activities.
- Evidence that visual artists have an integral role in policy development and programming.
- Commitment to payment of professional fees to visual artists.
- Evidence of due consideration of women and individuals of racially and culturally diverse communities.
- Appropriateness and adequacy of facilities and equipment.
- Constituency and community served.
- Evidence of applicant's ability to administer the project, including organizational stability and appropriateness of budget for the proposed activities.
- Evidence of sound management, planning, and development policies.[246]

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[245] National Endowment for the Arts, Music Ensembles Application Guidelines FY 1991 19 (1990).

[246] National Endowment for the Arts, Application Guidelines FY 1991 8 (1990).

Consistent with the greater resources at stake, the review criteria for Challenge III grants are even more detailed and fall under four general headings, each of which contains several subheadings. The general criteria and some of the subheadings are:

Criterion #1 Quality of the project

A. Artistry: The project's potential for achieving the highest artistic quality of national significance and lasting impact on the art form or excellence in it.

B. Access: The project's potential to develop improved and broadened access, on a long-term basis, to the arts of quality.

C. Appreciation: The project's potential, on a long-term basis for developing deeper and broader education in and appreciation of the arts of highest quality and of cultural significance.

D. Support Systems for the Arts: The project's potential, on a long-term basis, to assist nonfederal support systems (e.g., subgranting, technical assistance) to address any one or a combination of objectives A through C.

Criterion # 2 Ability to complete the project successfully

Criterion # 3 Ability to meet the match [reference to matching grants requirement]

Criterion # 4 Where appropriate, indications that the project can be sustained in the future without Federal support

The foregoing criteria suggest that management ability plays as large a role in Challenge Grants as artistic ability.[247]

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[247] One high-level official in the Challenge Grant Program suggested: "If an organization is terrific at art but not well managed, then it won't be funded."

C. Procedures for Awarding Grants

The discretionary grant award process at NEA is very similar to that of NIH, upon which it is modeled.[248] As in NIH, an NEA grant application goes through a "dual review" in one of more than 90 review panels and in the National Council on the Arts. Prior to submitting an application, a prospective applicant may telephone or meet with an agency staffer (called a Program Specialist) to discuss the proposed project and obtain feedback on how best to formulate the proposal.[249] When an application arrives at NEA, it is "logged in," a process in which basic information from the application is entered into a computer and an application number assigned. Applications are then forwarded to the appropriate Program Office.[250] For applications for which site visits are required, the Program Office selects outside experts to conduct the site visit (e.g., attending live performances, observing facilities, visiting with applicants, etc.) and report back to the staff.[251] Most applications, however, can be evaluated on the basis of other "artistic evidence," such as manuscripts, slides, and tapes.

When all the evidence is available, it is forwarded to the relevant Advisory Panel or Panel section.[252] Every major NEA Program has a panel, and some are so large that their panels are broken down into panel sections.[253] Each panel or panel section is composed of from five to fifteen members appointed by the Chairman of NEA (usually with heavy reliance on the Program Directors) on the basis of "expertise, aesthetic diversity, geographic dispersion, ethnic and gender representativeness, ability to serve, etc."[254] Panels are assembled from long lists of nominees from the council, staff, current panel members, national artist associations, the general public, and the White House.[255] The agency attempts to assemble panels that "include wide diversity on many levels appropriate to each program: different artistic and programmatic viewpoints; expertise in different aspects of the art form/field (different types of creative and performing artists, arts administrators, trustees, critics, educators, large and small organizations, traditional and experimental work, etc.); experience with the field in different parts of the country, different ethnic and cultural backgrounds, and a reasonable balance of men and women."[256] Virtually all panels include representatives from a State or Local Arts Agency or regional arts organization. As mandated by 1990 amendments to the agency's statute, panels always include a member of the lay public with no particular expertise in any of the artistic areas covered by the panel.[257]

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[248] The following discussion of the procedures in place in NEA draws on two primary sources. National Endowment for the Arts, Summary of Steps in the Current Application/Grant Process (manuscript April 3, 1990) [hereinafter cited as NEA Summary]; National Endowment for the Arts, Panel Study Report (1987) [hereinafter cited as Panel Study Report].

[249] According to one NEA official; "We do a good bit of handholding - the applicants can come in and get help."

[250] Program Offices are often subdivided into several "areas." Each area usually has a Program Director, an Assistant Program Director, and one or more Program Specialists. Each Program Specialist is responsible for several subcategories of applications. The staff's role is supposed to be purely ministerial; staffers are not to become involved in substantive decisionmaking.

[251] Site visits are always required for Challenge III grants, and NEA has in fact contracted with a consultant to visit applicant institutions, examine their management capabilities, and report back to NEA. The consultants prepare a three to four page memorandum analyzing the applicant's fundraising plans, the qualifications of its board of directors and staff, its historical strength and commitment to the future, its debt management, and other aspects of its managerial abilities.

[252] In addition to the "grant advisory panels" that the agency assembles to review and make recommendations of individual applications, it also empanels "policy advisory panels" to provide advice on "priorities, practices, guidelines and the allocation of resources for individual programs." The Independent Commission on the National Endowment for the Arts, *supra* note 232, at 25-26. Members of policy panels have usually already served on grant panels. *Id.*

[253] National Endowment for the Arts, Arts Endowment Panels (Mimeo, March 1990) [hereinafter cited as Arts Endowment Panels].

The peer review panel system that the NEA developed very early in its history "marked the triumph of professional judgment over political patronage."[258] All potential panel members "are carefully evaluated on their professional standing as well as their ability to articulate issues confronting their field and their willingness to make the necessary commitment of time and energy to prepare for and to attend panel meetings."[259] In addition, "[w]hile no panel section is large enough to accommodate representatives of every conceivable aesthetic viewpoint, care is taken to ensure diversity of opinion."[260] New Panels are reconstituted each year. Turnover rates vary from 33-100 percent per year.[261]

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[254] NEA Summary, *supra* note 248, at 2,; The Independent Commission on the National Endowment for the Arts, *supra* note 232, at 28.

[255] Comment, *Turmoil at the National Endowment For the Arts: Can Federally Funded Art Survive the 'Mapplethorpe Controversy*?, 39 BUFFALO L. REV. 231, 254 (1991).

[256] Arts Endowment Panels, *supra* note 253, at 2. The concern for ethnic and cultural backgrounds and balance of men and women came after "the system of deference to established professionals came under fire for perpetrating elite domination of the cultural spheres." Comment, *Standards for Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV L. REV 1969 (1990). In 1985, Congress directed that NEA select panelists "who broadly represent diverse characteristics in terms of aesthetic or humanistic perspective, and geographical factors, and who broadly represent cultural diversity." Page 1974. Arts, Humanities, and Museum Amendments of 1985, Pub. L. No. 99-194, §110 (I) (G), 99 Stat. 1332, 1340 (1985) (Codified at 20 USC §960 (A) 1988).

[257] *See* text accompanying note 363, *infra*.

[258] Comment, *supra* note 256, at 1974. *See also* Comment, *supra* note 255, at 254.

[259] Panel Study Report, *supra* note 248, at 13.

[260] Panel Study Report, *supra* note 248, at 13. The Independent Commission on the National Endowment for the Arts, *supra* note 232, at 27. ("Expert knowledge, dedication to the arts, aesthetic diversity, geographic distribution, ethnic and gender representation, ability to serve and to articulate issues in the field are all taken into consideration in this process.").

[261] For some Programs, a 100 percent turnover rate is important for preserving the appearance as well as the reality of objectivity. For example, in the Visual Arts Program, the Panel considering applications for individual fellowships is completely replaced every year.

No panel member may serve for more than three consecutive years.[262] In all, about 800 people serve on NEA panels each year.[263]

The Program Office staff sends a "Panel book," containing a detailed summary of each application, the grant history of the applicant at NEA, and a brief discussion of any problems that the staff has identified, to each member of the relevant panel or panel section two to four weeks in advance of the panel meeting.[264] The panel meets in Washington, D.C. for from one to six days, depending upon the workload.[265] Panelists review all the applications assigned to the panel with reference to the review criteria published each year in the Program's guidelines. Some panels divide up the work by assigning each member the role of "primary reviewer" for 10-15 applications. Other panels do not divide up the work. One NEA staffer related that his program tried the "primary reviewer" approach, but abandoned it after discovering that the remaining panelists did very little to familiarize themselves with the applications.

Panel meetings are taped and the staff always takes notes. The object of the meeting is to make a recommendation to accept or reject each application and to recommend funding amounts for those that are recommended for acceptance. Although each panel evolves its own procedures for carrying out these evaluations, panel meetings typically progress in five phases: "(1) presentation of material, (2) discussion of applications, (3) formulation and recording of panel judgments, (4) determination of recommended grant amounts, and (5) final review and adjustment of recommendations."[266] In some programs, panelists are provided with ballots broken down in accordance with the review criteria, and panelists are asked to grade each proposal on a scale of one to ten or one to a hundred for each review criterion. The agency staffer responsible for averaging the scores can identify any "outliers" in which vote spreads are very large and ask the panel to discuss those applications in more detail. The panel then proceeds down the list of applications in rank order and assigns a funding amount to each application until its monetary resources are exhausted.

The Director or Assistant Director for the relevant Program attends the meetings to ensure that the results are determined solely on the basis of the published criteria, that conflicts of interest are dealt with appropriately, and that the deliberations are carried out in an atmosphere of fairness. The Program Directors can deal with cases of apparent bias subtly during the meetings, or they can raise their concerns privately with the NEA Chairman after the meeting. Program Directors attempt to avoid becoming involved in substantive discussions, because they want to avoid the perception that government employees are interfering with the peer review process. According to one Assistant Program Director: "It is vital that we are perceived to be dealing with the field in an objective fashion and that all recommendations be made by the panels."

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[262] 45 USC §959(c)(6).

[263] Facts about the Art Endowment. In 1989, nearly 800 persons served on the 103 panels that NEA convened. The Independent Commission on the National Endowment for the Arts, *supra* note 232, at 25-26.

[264] Most of the larger programs use more than one Panel. For example, the Music Program uses thirteen Panels. Panel Study Report, *supra* note 248, at 11. A few Panels serve more than one Program. *Id.*

[265] The Independent Commission on the National Endowment for the Arts, *supra* note 282, at 30.

[266] Panel Study Report, *supra* note 248, at 21; The Independent Commission on the National Endowment for the Arts, *supra* note 282, at 30.

After the panel meetings,[267] the Program Director and staff meet with the Deputy Chairman for Programs to review panel recommendations that were particularly controversial or raised special policy concerns, any significant trends observed, and any issues that might cut across two or more Programs.[268] The Chairman may ask to review particular files, and he occasionally convenes additional meetings with the staff to discuss particular applications or issues. When the staff or the Chairman believes that a panel has made a mistake, the panel can be called back to Washington for an additional meeting, but this happens only very rarely. The Chairman rarely reverses a panel outright. As a practical matter, the "advisory panels, through their recommendations, have come to be the determining element in the grant making process."[269]

The next step in the process is review by the National Council on the Arts. After being sued by two newspapers under the Federal Advisory Committee Act, the agency decided in 1990 to open all Council meetings to the public. Prior to the Council's quarterly meetings, the staff prepares a book for each Council member containing summaries of the applications that were recommended for approval and other materials regarding the panel discussions. These books are not made available to rejected applicants or to the general public. Lists of rejected applications are generally included in the books. Council members may review one or more of the applications if they desire, but they rarely see more than the staff-prepared summaries. The Council usually votes on the recommendations of a panel in a block and only very rarely singles out individual applications for separate votes.[270]

After the Council meeting, the applications go to the Chairman for final action. The Chairman usually follows the Council recommendations, which in turn are usually based upon the panel recommendations. The 1990 Amendments to the agency's statute prevent the Chairman from overruling the Council's recommendation not to fund an application.[271] On occasion, the staff will urge the Chairman to overrule the Council when the Council departs from the recommendation of the panel for reasons that the staff deems to be inappropriate.[272] Although the Council is informed of the Chairman's action on each application, the Chairman is not required to provide any explanations. Some Chairmen are very careful to prepare detailed justifications couched in the language of the published criteria. Others provide little, if any, justification for rejecting Council recommendations. The Program officers then prepare acceptance or rejection letters for the applicants. Rejection letters are usually form letters containing only general information and the applicant's score, but occasionally they are more personalized.

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[267] Because the Challenge Grants Program cuts across all substantive program areas, it conducts a second review by a "super panel" made up of panelists from the 14 original screening panels to place the projects from all 14 panels in rank order and recommend funding levels.

[268] Panel Study Report, *supra* note 248, at 23. For example, on one occasion, the Director of the Visual Arts Program disagreed with a panel recommendation that a choreography group be funded because the Director believed that the particular project did not come within the domain of visual arts. The Program Director there recommended disapproval of the proposal, and the Chairman agreed.

[269] The Independent Commission on the National Endowment for the Arts, *supra* note 232.

[270] *Id.* at 30-31 (1990).

NEA's publicly available materials are vague as to how the agency fulfills its Privacy Act obligations. Disappointed applicants may request and receive "information about the panel review of their applications" by calling or writing the Program, but the agency's regulations and guidelines do not say whether the information available to applicants includes any minutes of panel or Advisory Council meetings or any summaries of any individual peer reviews.[273] It rather clearly does not include a copy of the transcript of the tape recording of the meeting. The Endowment's regulations on information availability speak only to procedural issues,[274] and agency practice varies widely. Some Program staffers are willing to discuss the contents of panel meetings in some detail over the telephone with rejected applicants; others prepare summary statements from staff notes and meeting transcripts; and still others do not undertake to interpret the results but let the scores speak for themselves. Disappointed applicants may request that the General Counsel correct a record, including presumably errors on a written evaluation. If the General Counsel agrees with the program office that the request should be denied, the matter is referred to the Deputy Chairman for resolution. If the Deputy Chairman agrees, then a letter is sent to the applicant informing him or her of the decision and the reasons therefore. The applicant may then request an informal hearing before the Chairman or Assistant Chairman.[275]

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[271] 20 USC §955(f).

[272] For example, one member of the Council is firmly committed to the proposition that NEA should not fund criticism in any form, despite the fact that nothing in its charter prevents funding such projects. On one occasion, the staff urged the Chairman to overrule the Council's decision to reject two grants related to arts criticism that had been recommended by the respective panels. After the 1990 Amendments to the agency's statute, the Chairman is no longer empowered to overrule a recommendation not to fund a particular project. *See* note 271, *supra*.

[273] 45 CFR §1115.

[274] 45 CFR pt. 1100.

Reacting to charges that panelists were frequently participating in deliberations on applications from institutions that employed them, Congress in 1990 amended the agency's statute to prohibit individuals who are employees or agents of an organization with an application pending from serving on a panel considering that application.[276] The Arts Endowment has amended its "Standards of Conduct for Council Members and Arts Endowment Panelists" to reflect this stricter conflict of interest requirement.[277] The standards also address some additional aspects of bias in application review. The standards are "designed to avoid situations which may compromise, or appear to compromise, their objectivity while not preventing their continuing involvement in the arts."[278]

The standards contain a general direction to every Council member and panelist "to avoid any action that is, or could be interpreted as, a use of Council membership or panel service to further his or her own interests or those of an organization with which he or she is affiliated."[279] Council members may not submit an application on behalf of themselves or sign an application on behalf of an organization with which they are affiliated, and they may not participate in any way in a decision involving an application from an organization that employs them or with which they are affiliated. Panelists may not submit an application on behalf of themselves or through a fiscal agent or as a collaborator or on behalf of an organization that employs them or for which they are an agent if the application will be evaluated by the subpanel (or panel, if it is not divided into subpanel) on which they serve.[280]

The regulations provide that Council members may not participate in the review of an application from an organization with which they are affiliated, and they must "avoid affecting or appearing to affect the decisionmaking process in any way."[281] If Council members or organizations with which they are affiliated are recommended for funding by a panel, they may not participate in the review of the application. The Council member must physically leave the room during the consideration of such proposals. Panelists may not serve on a panel reviewing an application for an organization that employs them or for which they act as an agent.[282] All communications with the Arts Endowment concerning an application or grant must be carried out by personnel who are not Council members or panelists.[283]

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[275] 45 CFR §1115.5.

[276] 20 USC §951 et seq. Prior to 1990, the statute prohibited a panelist from submitting an application to his or her panel, but did not speak to organizations with which the panelist was affiliated.

[277] Memorandum to Members, National Council on the Arts and Arts Endowment Panelists from Amy Sabrin, General Counsel, on "Standards of Conduct for Council Members and Arts Endowment Panelists, dated September 18, 1991 [hereinafter cited as NEA Standards of Conduct].

[278] NEA Standards of Conduct *supra* note 277, at 2.

[279] *Id.*

[280] *Id.* at 3.

[281] *Id.* at 4.

Council members and panelists may receive remuneration for participation in funded activities, but only if the Council and the Endowment staff know the approximate amount of the remuneration prior to acting on the application. Of course, they may not participate in the consideration of such applications.[284] The propriety of receiving remuneration depends on "the nature of the organization, the amount of Endowment funding in relation to the total budget of the organization, and other relevant factors."[285]

Council members and panelists may not make use of confidential information acquired as a result of their service "in any manner which would advance their financial interests."[286] This prohibition, however, is not intended to prevent Council members and panelists from supporting artistic endeavors with which they become acquainted during their service.[287]

To aid in the enforcement of these conflict of interest prohibitions, the Standards of Conduct require Council members and panelists to provide timely reports to the Endowment concerning their employment or interests (financial or otherwise) in organizations eligible to receive NEA money. Possible conflicts of interest are also discussed at the beginning of every Council meeting and panel session.

The Standards of Conduct speak directly to the touchy issue of animus. They provide that when a Council member or panelist or an organization with which he or she is associated is in the midst of an adversarial economic relationship with an applicant, the member or panelist must leave the meeting during which the application is being considered. The Standards of Conduct do not elaborate on the novel concept of adversarial economic relationship. For example, they do not address the question whether being the beneficiary of a competing application constitutes such a relationship. The Standards of Conduct are careful to provide that Council members and panelists may advocate general policies for adoption by the Council, even though the policies might have an adverse impact on competitors, so long as the policies would be implemented in a general way to all applicants.[288]

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[282] *Id.*

[283] *Id.* at 3.

[284] *Id.* at 4.

[285] *Id.*

[286] *Id.* at 9.

[287] *Id.* at 5.

[288] *Id.*

NEA has a formal appeals process whereby a program specialist or other agency staffer, but not a rejected applicant, can obtain a reconsideration of a rejected application.[289] Within 30 days following a decision not to fund, a Program specialist or other "authorizing official" in one of the programs may request an explanation for the decision not to fund from the relevant Program Director. The Program Director must then provide the requester with an explanation together with "the substance of the advisory panel review comments." The requester must be given an opportunity to "present his or her point of view."[290]

Beyond this strictly internal review for which the rejected applicant must have a "sponsor" within the agency, a rejected applicant may request reconsideration solely on the following procedural grounds: (1) the panel relied on criteria outside those listed in the published guidelines; (2) the application was declined "based on influence on advisory panel [sic] of member(s) with undisclosed conflict of interest;" or (3) the application was declined "based on information provided to the advisory panel by staff or panelists that was materially inaccurate or incomplete at the time of review despite the fact that the applicant had provided the Endowment staff with accurate and complete information as part of the regular application process." This process may only be invoked, however, if a program specialist or other authorizing official has sought and received an explanation from the Program Director.[291] After consulting with the Chairman, the appropriate Deputy Chairman must then reconsider the action and within 45 days provide a written summary of the results of his reconsideration. The Deputy may request that surveys or site visits be conducted with respect to applicant organizations requesting reconsideration.[292]

From the foregoing description it is clear that while reconsideration is a possibility, it is not within the control of the rejected applicant. If the applicant does not have a sympathetic sponsor within the agency willing to "go to bat" for the project, the opportunity for reconsideration is effectively lost. The agency makes it clear, however, that a new application is welcome in the next funding cycle.

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[289] National Foundation on the Arts and the Humanities, Federal Assistance; Reconsideration of Declined Applications, 61 Fed. Reg. 13118 (1983) [hereinafter cited as Reconsideration Regulations]. The statute does not explicitly provide for appeals from denials of grants. *Comment, The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 GEORGETOWN LAW JOURNAL 1491, 1545 (1986).

[290] Reconsideration Regulations, *supra* note 289, at 13118.

[291] *Id.*

[292] *Id.*

D. The Process in Operation

The extensive peer review-based system at NEA is intended to assume the principal burden of making qualitative judgments on the merits of proposals while at the same time ensuring that "Federal assistance does not lead to government dominance or control in the sensitive area of aesthetics, artistic expression, and creativity."[293] The concern for avoiding undue governmental influence on the content of artistic work distinguishes NEA from NIH, NSF, EPA and other scientific funding agencies. In the scientific agencies, there is a general reluctance to allow the government to tell a scientist how to practice science, but the funding agencies have a responsibility to steer research in directions relevant to their missions. In the arts, attempts to steer grantees in particular directions may be construed as government dominance of expression or creativity. Although there are always disputes at the margins between mavericks and adherents to the dominant paradigm, there are generally agreed upon criteria for "good science" in most fields, and the peer review committees are not at all unwilling to downgrade a proposal that does not manifest good science. The distinction between "good art" and "bad art" is much more elusive, and judgments about the quality of the subject matter of a proposal can easily be interpreted as attempts to steer artistic expression in particular directions. Past NEA Administrators have assiduously attempted to avoid invoking the specter of a "cultural ministry" through which the state determines what art and music the public should and should not enjoy.

1. Peer Review Under Fire

Throughout most of its history, NEA's heavy reliance on peer review panels to guide discretionary dollars to promising artists and musicians has shielded the agency from attack by disappointed applicants and irritated taxpayers.[294] As recently as 1981, a White House Task Force on the Arts and the Humanities, appointed by President Reagan and chaired by actor Charlton Heston praised NEA's peer review system as an "achievement" of "ongoing and widely accepted effectiveness."[295] In recent years, however, NEA's funding decisions have come under intense public scrutiny. Most of the controversy has involved the substantive outcome of the process—critics do not agree with the agency's funding decisions. Some of these criticisms, however, have been directed to the peer review process itself.

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[293] Arts Endowment Panels, *supra* note 253, at 2. *See* Comment, *supra* note 256, at 1972 ("the drafters and early officials turn to professionalism-deference to the judgment of acknowledged art supporters and professional artists and organizations-to serve the goals of both depoliticization and excellence.").

[294] Grace Glueck, *A Federal Benefactor of the Arts Come of Age*, N.Y. Times, Nov. 10, 1985, sec. 2, p. 1, col. 1 (recounting NEA's successful defense against attacks by a Texas Congressman for supporting allegedly pornographic poetry); McLellan, *supra* note 8 (recounting several failed external attacks on NEA in response to individual funding decisions and quoting the Chairman of NEA to the effect that the peer review system protects him from political pressure).

[295] *Report Alleges NEA Rivalry*, Washington Post, August 3, 1981, C1.

The Serrano/Mapplethorpe Controversy and the Helms Amendment—Since its inception NEA has been criticized for funding "frivolous" projects that, in the critics' opinions, wasted taxpayer money. Early in its history, NEA won Senator Proxmire's infamous "golden fleece" award for a $6,000 grant to film the descent from an airplane of a four-mile-long piece of crepe paper.[296] But these criticisms were generally considered par for the course for an agency that sometimes took risks in the pursuit of creativity. As with the scientific agencies, which have also received their share of such awards, these attacks were sufficiently few and far between that they posed no real threat to the agency's routine operations.

The recent controversies over NEA's funding of allegedly obscene and indecent art have, by contrast, shaken the agency to the core. In 1988, a leaderless NEA provided funds to the Institution of Contemporary Art of Philadelphia to display an exhibit of the photographs of the recently deceased artist Robert Mapplethorpe.[297] Although the vast majority of the photographs were entirely unobjectionable, one part of the exhibit was a series of small photographs, entitled the "x, y, z series," that contained graphic representations of homosexual sexual conduct and sado-masochism.[298] At roughly the same time, NEA also funded an exhibition at the Southeastern Center for Contemporary Art in Winston-Salem, North Carolina of photographs by Andres Serrano that included the soon-to-be-infamous "Piss Christ" photograph that featured a crucifix immersed in a jar of the photographer's urine.[299] The predictable public outcry against the use of taxpayers' money to support such projects starkly raised the issue of NEA's political accountability and especially the accountability of its peer review panels.[300]

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[296] Lanquette, *supra* note 226.

[297] *See* [no author], Chronology of a Controversy, The Christian Science Monitor, July 31, 1990, p. 10.

[298] For a more detailed description of the Mapplethorpe controversy, see Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L. J. 2087 (1991) (characterizing the Mapplethorpe exhibit as "a considerable achievement," presenting "an aesthetic vision that is original and in many respects stunning"); Comment, *supra* note 255.

When the Mapplethorpe exhibit was moved to the Contemporary Art Center in Cincinnati, the Center was indicted by a local grand jury. A jury later found the defendants not guilty. *See* Comment, *supra* note 255, at 241-43.

[299] For a more detailed description of Serrano's work, see Jeff Lyon, Point Man, Chicago Tribune, Jan. 27, 1991, Sunday Magazine, p. 12. Soon to follow was Serrano's "Piss Pope" and similar denouncements of prominent authority figures. Apparently, Serrano's particular talent is the art of bodily fluids. According to Tony Jones, the President of Chicago's School of Art Institute, Serrano "is commenting on his relationship with the Catholic church and Catholic teaching, and the fluids are to capture the idea of trans-substantiation." Lyon, *supra*.

At the behest of Senator Jesse Helms, the Senate Appropriations Committee in January 1989 voted to prevent NEA from providing any appropriated funds to the offending institutions for a period of five years.[301] The full Senate, without debate, substituted an appropriations rider, later known as the "Helms Amendment," that prohibited NEA from funding art that would "promote, disseminate, or produce obscene or indecent materials, including but not limited to depictions of sado-masochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; or material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion."[302] This precipitated a pitched battle between arts supporters and NEA critics in the Senate and House, the ultimate outcome of which was a watered down version of the Helms Amendment that prevented NEA from funding art that "may be considered obscene...and which, when taken as a whole, does not have serious literary, artistic, political or scientific value."[303] Reacting to the strong political statement contained in the Helms Amendment, NEA Chairman John Frohnmeyer administratively added to grant application forms a "certification" through which grant recipients agreed not to produce "obscene" art with NEA money.[304]

Senator Helms' efforts inspired other critics of NEA to air their complaints about conflict of interest on the part of members of NEA peer review panels. A study conducted by the *Washington Times* purported to show that at least 130 of approximately 730 peer panelists who assisted NEA in 1988 sat on panels that recommended grants to their own organizations. The survey also reported that "[i]n several cases,...grant reviewers were named as principal beneficiary of federal grant awards by their own panels."[305] An NEA attorney admitted that it was not unusual for a panelist to sit on a panel that reviewed an application from an institution employing that panelist. NEA regulations at the time allowed this, so long as the panelist left the room during the deliberations on his or her institution's application. One NEA critic was unimpressed with this solution to the conflict of interest problem, arguing that:

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[300] Congressman Fred Grandy, a former television actor and a supporter of NEA observed: "It[]s an argument of perception, and you have a lot of people squandering money. I've been telling the artists that they need to come with something that gives the impression of accountability." Richard Bernstein, *The Outlook on Arts: Grants*, N.Y. Times, June 26, 1990, sec. C, p. 13, col. 4.

[301] Barbara Gamarekian, *Senate Panel Asks Ban on Grants to Two Arts Groups*, N.Y. Times, Jan. 26, 1989, sec. C, p. 19, col. 1. NEA's acting director protested the action, calling it "a dangerous precedent which goes against the long and widely respected system of Federal Support for the Arts through a competitive peer-review process." *Id.*

Ted Potter, the Executive Director for the Southeastern Center for Contemporary Art, complained that his institution was "being punished for doing exactly what we are supposed to do: challenge the public to see, think, and discuss critical issues of our culture and society. The role of contemporary arts and the institutions that foster it is to take risks and confront the established dogmas with innovative insights and to offer challenging exhibitions and experiences." *supra* at sec. C, p. 19, col. 1.

[302] Comment, *supra* note 255, at 235-39. (describing the process of enacting the Helms Amendment); Michael Oreskes, *Senate Votes to Bar U.S. Support of "Obscene or Indecent" Artwork*, N.Y. Times, July 27, 1989, sec. A, p. 1, col. 2.

In some respects, the amendment harked back to an earlier failed attempt by Congressman Biaggi to prohibit NEA funding of any productions containing "any ethnic or racially offensive material" after the Italian-American community was insulted by an NEA funded modernization of the opera *Rigoletto*. *See* Comment, *supra* note 289.

[303] Department of the Interior and Related Agencies Appropriation Act of 1990 Pub. L. No. 101-121, Tit. III, _. 304, 1989 US Code Cong. Admin. News (103 Stat.) 701, 741-42.

[304] *See* Owen M. Fiss, *supra* note 298. Comment, *supra* note 255, at 239.

> It is simply insufficient to say 'I'll leave the room (for debate on my grant)'.... "Your buddies are back there. The NEA knows before they set up the panels whether a person...is putting a grant proposal. This looks to me like more than seeming impropriety. This looks like impropriety itself.[306]

Another NEA critic observed:

> The very least that can be said of the system is that it was very much a buddy system. You give me a grant, I give you a grant, that sort of thing. Among professionals, they joke a great deal among themselves about how it works.[307]

Supporters of publicly funded arts and music responded with a vigorous defense of the peer review process[308] and

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[305] George Archibald, *NEA Review Panelists Run Grant-Giving "Buddy System,"* Washington Times, Aug. 3, 1990, p. A1.

[306] Allan Paracini, *Conflict of Interest Issue in NEA Grants?* L.A. Times, July 27, 1990, pt. F, p. 1, col. 5 (quoting Professor John Agresto, of Santa Fe College).

[307] Archibald, *supra* note 305 (quoting Mr. Hilton Kramer). Kramer also suggested that the peer-review system was "a corrupt way to make decisions about the best way to spend the agency's money," and that it had "degenerated into a sort of political club in which certain insiders knew well in advance where the money would be going." Jonathan Yardley, *In Conclusion, Reason But No Raison D'Etre*, Washington Post, Sept. 17, 1990, B2.

[308] In a letter to the editor of the N.Y. Times, Harvey Lichtenstein, President and Executive Director of the Brooklyn Academy of Music, gave the following defense of peer review at NEA:

> [T]he [peer review] system has worked superbly for almost 25 years of grant making by NEA.... I have found that the process of considering grant requests by the NEA panels and program directors impressively fair, [and] they have functioned with integrity and generosity of spirit. There has never been a hint of financial scandal or mismanagement, and the range of grants has cut through every ideological boundary.

Harvey Lichtenstein, *Where Are We Heading?* N.Y. Times, July 30, 1989, sec. 2, p. 33, col. 5. *See also* Editorial, *The Helms Process*, N.Y. Times, July 28, 1989, sec. A, p. 26, col. 1 ("So far, Congress has wisely relied on a peer-review process by which members of the arts community pass on grant applications in their respective fields. Now Senator Helms & Co. insist on what could be called the Congress-as-connoisseur process.").

> launched a full-scale offensive against broad-brushed government "censorship" that the Helms Amendment allegedly represented.[309] Some scholars took the position that such content-based restrictions on government-funded art was unconstitutional under a variation of the doctrine of "unconstitutional conditions."[310] Even those who did not contend that restrictions on government funding amounted to censorship complained that the Helms Amendment, which had been enacted without congressional debate,[311] represented bad public policy.[312]

Chairman Frohnmeyer's "certification" requirement, which was likened to a loyalty oath, outraged many grantees,[313] precipitated discord within the agency, and generated a rare recommendation from the National Advisory Council on the Arts that it be revoked.[314] It was eliminated after a federal district court, on January 9, 1991, held that it was unconstitutionally vague and had a unconstitutional chilling effect on the first amendment rights of grant recipients.[315]

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[309] John Farrell and Max Benavidez, *Let the Arts be Unfettered by Politics of the Moment*, L.A. Times, Aug. 7, 1989, pt. 2, p. 5, col. 1 (characterizing the Helms Amendment as "the most serious and radical assault on freedom of expression to occur in this country since the days of Joe McCarthy and 'black list.'); Editorial, The Helms Process, *supra* note 308 (arguing that the Helms Amendment "would plunge one aesthetic question after another into the boiling bath of politics," a prospect that was "unlikely to be good for politics" and would "surely be fatal to art").

[310] *See* Fiss, *supra* note 298, at 2096-2102. Comment, *supra* note 256. Rorie Sherman, *NEA Grant Provisos Attacked in Courts*, NATIONAL LAW JOURNAL, Nov. 5, 1990, p. 12 (quoting Professor Nan Hunter).

[311] Editorial, *More on Arts Funding*, Washington Post, July 30, 1989, C6 ("The Helms amendment was proposed to a near-empty chamber with little or no advanced warning, and with no examination of its implications for the existing peer-review system of awarding grants.").

[312] See, e.g., Matthew Gilbert, *Writers Blocked? New Rules for Grants Met With Trepidation*, Boston Globe, Mar. 7, 1990, p. 1; Howard Reich, *The Arts Under Assault: Why the NEA is at the Center of a Fierce Morality Play*, Chicago Tribune, June 24, 1990, p. 4. Interestingly, none of the recipients of NEA grants immediately upon enactment of the Helms Amendment declined the funds, probably because all of them believed that their work at the very least had redeeming artistic or literary value. *See* William O'Rourke, *Protesting NEA: National Endowment for the Arts and Jesse Helms' Obscenity Crusade*, THE NATION, June 25, 1990, vol. 250, no. 25, p. 880 ("All my depictions of sado-masochism and homo-eroticism have literary value, always have and always will.").

[313] *See* Dawn Shirley, *Dramatist Takes Sides in NEA Fight*, L.A. Times, May 17, 1990, pt. F, p. 7, col. 3 (quoting playwright Terrence McNally as saying: "I think it's better to drive a cab or wait tables than sign such a pledge."); Matthew Gilbert, *Writers Blocked? New Rules for Grants Met With Trepidation*, Boston Globe, Mar. 7, 1990, p. 1. The controversy over the certification requirement inspired the creation of a group, headed by author Larry McMurtry, the primary goal of which was "unfettered funding for the arts." *Id.*

[314] The Independent Commission on the National Endowment for the Arts, *supra* note 232, at 88. Comment, *supra* note 255, at 239-40. Kim Masters, *Arts Panel Urges End to Grant "Pledge,"* Washington Post, Aug. 4, 1990, p. G1.

The "NEA Four"—Until fairly recently, NEA Chairpersons only very rarely overturned the recommendations of the review panels. Livingston Biddle, NEA Chairman during the Carter Administration, could not recall a single instance in which he overturned a panel recommendation that a project be funded.[316] President Reagan's first NEA Chairman, Frank Hodsell, adopted a somewhat more proactive role, rejecting 20 applications recommended by review panels within a two-year period.[317] Nearly all these rejections were uncontroversial, and despite some early concerns, overtly political considerations were apparently absent from NEA funding decisions.[318] The controversy over the Mapplethorpe/Serrano exhibits and the Helms Amendment, however, subjected Hodsell's successors' actions to more intense public scrutiny.

President Bush's first appointee to head NEA was John Frohnmayer, a former college football star, amateur opera singer, and trial lawyer from Oregon who had little experience in managing large agencies or public controversy.[319] Almost immediately upon assuming office, he created a stir when he unilaterally withdrew NEA funding for an exhibit entitled "Witnesses" that focused upon the AIDS crisis.[320] At one point Frohnmayer explained that he took the action because the exhibit contained a letter from a dying AIDS victim that was harshly critical of Senator Helms, Representative Dannemeyer, and John Cardinal O'Connor, the Roman Catholic Archbishop of New York. Mr. Frohnmayer said that he took the unusual action of withdrawing funding because the exhibit was "political."[321] When asked how he was able to distinguish between "political" and "apolitical" art, Mr. Frohnmayer explained: "If you came to us and said, 'I want to create a political polemic,' we would not fund that. If you, on the other hand, said: 'I want to paint a "Guernica"' we would fund that. And the difference is we make our decision on the artistic content."[322] While it is easy to see how this subtle distinction was lost on the peer review panel that originally recommended that the project be funded, it is harder to identify the criteria by which the agency's political appointees could draw such distinctions in the future. To make matters worse, Mr. Frohnmayer allowed that "[t]he word "political" means something quite different in Portland, Oregon, than in Washington."[323]

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[315] Bella Lewitzky Dance Foundation v. Frohnmayer, 954 F. Supp. 774 (C.D. Cal. 1991). NEA eliminated the certification requirement as part of the settlement of a second lawsuit pending in New York. Fiss, *supra* note 298, at 2095 n. 25.

[316] Robert Pear, *Reagan's Arts Chairman Brings Subtle Changes to the Endowment*, N.Y. Times, April 10, 1983, sec. 2, p. 1., col. 1. Mr. Biddle took the strong position that the peer-review panels were a "bulwark of strength protecting the endowment from the whims and fancy of one person who is a federal bureaucrat."

[317] *Id. See also* Grace Glueck, *supra* note 294, at sec. 2, p. 1, col. 1.

[318] Grace Glueck, *supra* note 294, at sec. 2, p. 1, col. 1 (noting that NEA during the Reagan Administration funded painter Peter Saul, who was known for his vitriolic portrayals of President Reagan).

[319] Rorie Sherman, Calm Presence in the Middle of Arts Battle, NATIONAL LAW JOURNAL, July 2, 1990, p. 8.

[320] Grace Glueck, *Border Skirmish: Art and Politics*, N.Y. Times, Nov. 19, 1989, sec. 2, p. 1, col. 2; John Robinson, *Frohnmayer Weathers Storm at NEA*, Boston Globe, Nov. 18, 1989, p. 9; Editorial, *Mr. Frohnmayer's Fumble*, N.Y. Times, Nov. 17, 1989, sec. A, p. 38, col. 1.

[321] Glueck, *supra* note 320. Frohnmayer explained that there had been an "erosion of the artistic vision" of this show between the time the grant was awarded and its production. *Id.*

Perhaps unintentionally, Mr. Frohnmayer put his finger on one of the most serious problems with the application of the peer review model to the arts. Much art is in fact "political" when it makes statements, subtle or otherwise, about the allocation of political and economic power in society.[324] Politics is an important and inevitable part of the culture that surrounds and is reflected by literature, the visual arts and music. Art can no more be divorced from politics than it can be divorced from any other important aspect of contemporary life. The concept of "political" cannot adequately distinguish a polemic against Jesse Helms from a "Guernica," a bust of Lenin or a painting of Washington Crossing the Delaware. It can, however, be manipulated to steer art and culture into particular political directions. And this potential for subjecting government funded art to a "political correctness" test is precisely why Congress and early NEA Chairmen created the peer panel process to make the initial funding recommendations.[325]

If political art is not necessarily "bad" art, however, it is unclear whether the concept of "artistic excellence" provides criteria for distinguishing the good from the bad that are any more objective and any less subject to political manipulation. Does that concept contain constraining criteria capable of preventing the professionals on the peer review panels from advancing their own hidden political agendas through their funding recommendations? Can the peer review process itself be arranged so as to provide checks against such abuse? If not, must a society that elects to devote significant public resources to art expect more-or-less continuous struggles for political control over this powerful form of public expression?

Questions like these were at the center of the intense public debate that resulted from Frohnmeyer's decision on June 29, 1990 to overturn a peer review panel's recommendation that the agency fund projects by performance artists John Fleck, Holly Hughes, Karen Finley, and Tim Miller. Although all of the rejected artists had received NEA funding in the past,[326] none of them could be considered mainstream. Ms. Finley became famous for pouring jello in her bra and smearing chocolate on her naked body while on stage to symbolize "women being treated like dirt."[327] Ms. Hughes' satiric performances, which she described as "storytelling," "celebrate[ed] her lesbian sensibilities."[328] Tim Miller was a gay performance artist who also performed in the nude.[329] In one NEA-funded performance, John Fleck urinated on the stage,[330] and in another he simulated his male and female halves making love.[331]

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[322] *Id.*

[323] *Id.*

[324] Paul Mattick, Jr., Arts and the State, 251 THE NATION 348 (Oct. 1, 1990) ("The problem is that art has been politicized, the existence of state funding shows that the generally political hidden side of the arts has existed all along. The struggle over the NEA is a struggle for control of this political side.").

[325] *See* Fiss, *supra* note 298, at 2093-96; Comment, *supra* note 293.

[326] Paula Span and Carla Hall, *Rejected! Portraits of Performance Artists The NEA Did Not See Fit To Fund*, Washington Post National Weekly Edition, July 16-22, 1990, p. 10.

Although sufficient funds were available in the program to fund the applications, a worried Frohnmeyer telephoned the members of the panel privately to ascertain the reasons for their recommendations.[332] Frohnmeyer told a group of arts supporters in Seattle that "certain political realities" made it unlikely that he would decide to fund all of them.[333] The National Advisory Council on the Arts, in a rare move, put off a final recommendation until its August 1990 meeting. Instead of waiting for the results of that meeting, Frohnmeyer polled its members by telephone and determined that a majority of the Council opposed funding the proposals. Transcripts and notes of these telephone conversations released in subsequent litigation revealed that concerns for the "political" consequences of making the awards permeated the discussions.[334] The fact that this decision came within a month of a strong statement by the White House press secretary against NEA's support of "obscene" art[335] suggested to some that Frohnmeyer's decision may have been affected by pressure from the White House.

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[327] Barbara Gamarekian, *Head Of The NEA Is Said To Accept "Political Realities,"* N.Y. Times, June 29, 1990, B1, col. 5 (quoting Karen Finley). Ms. Finley maintains that "[t]here is nothing sexually exciting about my work; if there were I would be doing burlesque shows and centerfolds and making a lot of money." Culture critic Robert Friedman agreed: "Watching her smear her naked body with chocolate, then cover herself with alfa sprouts and tinsel, is about as sexual[] arousing as watching Julia Child bake a cake." Robert Friedman, From Yams to Chocolate, Newsday, Aug. 7, 1990, p. 54. Other observers, however, "have found less comfortable parallels between Finley's work and conventional pornography." Hilary DeVries, *All The Rage: Karen Finley Has Become In The Struggle Over Public Art Support*, L.A. Times, Oct. 21, 1990, p. 3. Finley acknowledged that her work was often overtly political: "It's about social issues they don't want to hear about. This is their last chance at trying to maintain the power structure of the straight white male." Paula Span and Carla Hall, *Rejected!*, *supra* note 326.

[328] Paula Span and Carla Hall, *Rejected!*, *supra* note 326. Art critic Cathy Curtis described Hughes' work as follows:

> Holly Hughes' work involves a poetic transformation of the everyday activities of women into gestures that reveal the elemental sexual nature shared by all of humanity. She strips away social veneer to uncover the primal essence of her characters. This is art that treats the human condition in a metaphorical way, with lyricism, warmth, and humor.

Cathy Curtis, *Defending the Avant-Garde From the Hysterical Helms of Conservatism*, L.A. Times, July 30, 1990, pt. F, p. 3, col. 1.

[329] Mr. Miller explained: "In a work called 'Some Golden States,' there is one section right at the beginning of the piece where I tear my clothes off and I'm basically kind of thrown around on a pile of leaves. It's a piece I made about the reality of my hometown, Whittier, being destroyed in the 1987 earthquake." Paula Span and Carla Hall, Rejected!, *supra* note 326.

[330] Fleck explained: "Whoopie doopie. Taken out of context is sounds like sensationalism. But there was some social relevance attached. It really wasn't disgusting or rude or crude. I don't think anybody was offended by it. In fact, I think if you look back it's nothing new. It's been done before." Paula Span and Carla Hall, Rejected!, *supra* note 326.

[331] Paula Span and Carla Hall, Rejected!, *supra* note 326.

[332] George Archibald, Speculation in Arts World Has Frohnmayer Quitting, Washington Times, July 2, 1990, pt. A, p. A3.

[333] Barbara Gamarekian, *supra* note 327.

The rejected artists did not suffer their defeat quietly. Mr. Miller called Frohnmayer a "sleaze-ball appointee" of "King George Bush."[336] Ms. Hughes wrote in the *New York Times* that: "[t]he overturning of these grants represent Mr. Frohnmayer's and President Bush's attempt to appease the homophobic, misogynist and racist agenda of Senator Jesse Helms and company."[337] Some artists who received funding vowed to return their grants to NEA or give portions of them to the rejected artists.[338] Members of the Theater Arts peer panel complained bitterly in public about the Chairman's rejection of the panel's recommendations,[339] and the panel refused to make any more recommendations.[340] Even the mayors of Los Angeles, Seattle and New York protested the decision.[341] In his defense, Frohnmayer explained: "I think we cannot look strictly at artistic excellence in a vacuum, but we have to look at how it is going to play with the audience that we're charged with serving—which is the people."[342]

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[334] *See U.S. Documents Said to Show Endowment Bowed to Pressure*, N.Y. Times, September 18, 1991, A1, Col. 5. The transcripts contain one very revealing interchange that says a lot about the tension between professional values and democratic accountability. At one point, Frohnmeyer queried the panelists: "Let me ask the very crass and difficult political question, what am I going to say when one of our critics comes in…and says 'Gees, they funded a guy who whizzes on stage?' One of the panelists responded: "Who knows? Who cares? They're good." Kim Masters, *Politics of Arts Grants Questioned*, Washington Post, September 18, 1991, B1.

[335] Comment, *supra* note 255, at 249, (quoting Bedard & Archibald, *"Bush Has a Change of Art,"* Washington Times, June 13, 1990, at A1).

[336] Allan Paracini, *Cal Arts May Turn Down NEA Money*, L.A. Times, July 3, 1990, pt. F, p. 1, col. 6.

[337] Holly Hughes and Richard Elovich, *Homophobia at the NEA*, N.Y. Times, July 28, 1990, A15, col. 3.

[338] Paracini, *supra* note 336; William H. Honan, *Anti-Obscenity Pledge for Grants is Modified*, N.Y. Times, July 2, 1990, A13, col. 5.

[339] Joyce Price, *NEA's Rejection of Four Grants Riles Advisory Panel*, Washington Times, July 9, 1990, p. A3. Phillip Arnoult, Chairman of the Solo Performance Fellowship Panel said: "I am very concerned about the four artists, and I have an equal concern about the peer-review panel process and how it was dealt with in a very unusual way." *Id.* The panel issued a joint statement deploring the action "and the political manipulations which prompted it." Allan Paracini, *Mayor Blasts NEA Awards $3 Million In City Funds*, L.A. Times, July 12, 1990, pt. F, p. 1, col. 2. Jacob Neusner, a member of the Advisory Council, responded: "This is gobbildy gook from self-righteous people who make decisions for their own purposes, not as a result of values and sensitivities that matter to others." Price, *supra*.

[340] Melinda Bargreen, *The Embattled Arts Agency Finds Itself Surrounded On All Sides As Its Reauthorization Vote Draws Near: Targeting The NEA*, The Seattle Times, July 22, 1990, L1.

[341] Paracini, *supra* note 339.

The Independent Commission Report—One of the results of the 1989 Mapplethorpe controversy was legislation creating an "Independent Commission" to review NEA's grant making procedures, including the peer review process, and to "consider whether the standard for publicly funded art should be different from the standard for privately funded art."[343] President Bush appointed to the Commission a group of prominent individuals from both sides of the great NEA debate. Within a relatively short time, the Commission produced a unanimous report that adopted a consistent middle-of-the-road posture toward both of the issues that it was assigned to investigate.[344]

On the question whether publicly funded art should be judged by different standards than privately funded art, the Report concluded:

> Publicly funded art must be measured, like privately funded art, against standards of artistic excellence. Publicly funded art must be judged by other standards as well.... It should be chosen through a process that is accountable and free of conflicts of interest. It should be selective with an awareness of the geographic and cultural diversity of the United States and with respect for the differing beliefs and values of the American people.... Insuring the freedom of expression necessary to nourish the arts while bearing in mind limits of public understanding and tolerance requires unusual wisdom, prudence, and most of all, common sense.[345]

With respect to NEA's decisionmaking procedures, the Commission noted that Congress had never meant for the National Council and the peer review panels to be the final decisionmakers, and it stressed that only the Chairman was accountable to the public through the political process.[346] The Commission went further to recommend that the Chairperson "be given more authority and more choices."[347] Noting that no other granting agency gave peer review panels such discretion over both whether to award grants and the amounts of those grants,[348] the Commission suggested that the panels and the Advisory Council "recommend more grants than funds available for them, thereby giving the Chairperson a genuine choice in awarding grants."[349]

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[342] William H. Honan, *Arts Agency Says Public Is Losing Confidence*, N.Y. Times, July 3, 1990, B1, col. 6. As is often the case in such matters, the controversy apparently attracted much greater interest in the performances of the NEA four. Not long after the controversy broke out, Karen Finley performed to sold-out houses at the Lincoln Center. Hilary DeVries, *All The Rage: Karen Finley Has Become In The Struggle Over Public Art Support*, L.A. Times, Oct. 21, 1990, p. 3.

[343] The Independent Commission on the National Endowment for the Arts, *supra* note 232, at 1.

[344] The Independent Commission on the National Endowment for the Arts, *supra* note 232.

[345] *Id.* at 2-3.

[346] *Id.* at 16.

[347] *Id.* at 65. The Commission rejected a suggestion by Stephen Weile, an official at the Hirshhorn Museum and Sculpture Garden, that the agency's statute be amended to take away the Chairman's

The Commission also expressed concerns about conflict of interest among panel members, and it recommended that NEA "insure that panelists do not serve as members of panels that consider applications for grants from institutions with which they are affiliated."[350] At the same time, the Commission urged the agency to "insure that the membership of panels represents a variety of aesthetic and philosophical views."[351] The Commission noted that the potential for bias could be reduced by commissioning multiple panels in a single discipline, a solution that "would not only lessen the possibility of conflicts of interest but would reduce the number of applications before a single panel."[352] In addition, the pool of potential panelists should be expanded to include "people who do not earn their living in the arts," such as "art critics, collectors, educators, trustees or others with an aesthetic knowledge of a particular discipline and a view of the world outside the arts."[353] Finally, the Commission recommended that panelists' terms be limited to three years.[354]

Although stressing throughout its report the need to maintain accountability, the Commission recommended that panel meetings remain closed to the public.[355] The Commission listed several reasons for this position:

> First, panelists are likely to be more candid if they are discussing, behind closed doors, the work of a colleague or prominent competitor. Candor would also be compromised if an applicant were sitting in the room. Second, open panels are an invitation to pressure groups and lobbyists, seeking to influence the decision of panelists. Third, a frank discussion of a particular proposal could damage the reputation of an artist or institution. Finally, and of particular importance, public knowledge of a panel's deliberations prior to the consideration

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individual veto power and to force the Chairman to approve or reject all of a panel's recommendations en masse. Allan Paracini, *NEA Panel Seeks Consensus as Time Pressure Builds*, L.A. Times, Aug. 2, 1990, pt. F, p. 1, col. 5.

[348] The Independent Commission on the National Endowment for the Arts, *supra* note 232 at 72.

[349] *Id.* at 65.

[350] *Id.*

[351] *Id.* at 66.

[352] *Id.* at 74. The Commission also suggested that NEA consider awarding multi-year grants. *Id.*

[353] *Id.* at 74.

[354] *Id.*

[355] *Id.* at 76.

> of an application by the National Council and the Chairperson could act as a restraint on their exercise of discretion.[356]

At the same time, the Commission recommended that the agency maintain careful records of panel deliberations and make them available to rejected applicants if requested so that the applicants would "have access to the reasons their applications were accepted or rejected."[357]

The 1990 Amendments—The Helms Amendment also appeared in the agency's 1990 appropriations act, but an attempt to include it in the 1991 appropriation died in conference committee.[358] Helms and his allies in Congress were not, however, willing to rely entirely upon appropriations riders to ensure that the agency adhered to their policies. When the agency's statute came up for reauthorization in 1990, Senator Helms and others attempted to write the anti-obscenity language into the agency's authorizing legislation. Supporters of the arts community in Congress struggled to limit the constraints that the statute placed on the agency. The result was a compromise. Relying heavily upon the Independent Commission's report,[359] Congress declined to write a broad prohibition against funding "indecent" projects into the statute. Instead, the amendments required any recipient of a grant later determined to be "obscene" by a court to refund the grant to NEA. In addition, the requirements for awarding grants were changed somewhat from a preference for projects that "foster excellence," and reflect "significant, literary, scholarly, cultural, or artistic merit" to an injunction that awards be based "solely on...artistic excellence and artistic merit,"[360] taking into consideration "general standards of decency and respect for the diverse beliefs and values of the American public."[361]

The amendments also addressed the grant awarding process. Reacting to charges that panelists sometimes suffered from conflicts of interest,[362] the amendments required NEA to issue regulations and establish procedures to ensure that "all panels include representation of lay individuals who are knowledgeable about the arts but who are not engaged in the arts as a profession and are not members of either artists' organizations or arts organizations."[363] In addition, the membership of each panel had to "change substantially from year to year" with no member serving more than three consecutive years.[364] The agency was also required to ensure that "an individual who has a pending application for financial assistance...or who is an employee or agency of an organization with a pending application, does not serve as a member of any panel before which such application is pending."[365] As related above, NEA has recently promulgated regulations implementing these changes. Having changed the process of selecting panelists, Congress went on to grant them somewhat more autonomy by providing that the Chairman of NEA may not approve an application with respect to which the National Advisory Council on the Arts has given a negative recommendation.[366]

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[356] *Id.*

[357] *Id.* at 77.

[358] Comment, *supra* note 255, at 240 n. 48.

[359] The Independent Commission on the National Endowment for the Arts, *supra* note 232, at 89 (Commission recommends "against legislative changes to impose specific restrictions on the content of works of art supported by the endowment").

[360] 45 USC §959(c).

[361] 45 USC §954(d)(1). Professor Fiss fears that this reference to "general standards of decency" allows the NEA Chairman too much discretion to refuse grants that are not obscene, but are nevertheless controversial. Fiss, *supra* note 298, at 2094-95 ("The chairperson is freed from the *Miller* standards and is able to deny funding to a project like Mapplethorpe's, even though it is not within the constitutional definition of obscenity and thus not amenable to criminal prosecution.").

[362] *See* text accompanying notes 305-312, *supra*.

Post-1990 Practice—Although many in the arts community were alarmed by the 1990 amendments,[367] Chairman Frohnmeyer assured them that he would not become a "decency czar."[368] As if to prove his point, he quickly approved grants to Karen Finley and Holly Hughes, two of the "NEA four," thereby invoking the wrath of the anti-obscenity forces.[369] At the same time, the National

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[363] 45 USC §959(c)(2).

[364] 45 USC §959(c)(6).

[365] 45 USC §959(c).

[366] 45 USC §955(f). Despite this change, Professor Fiss argues that the net effect of the 1990 amendments is to give the NEA Chairman more power vis-a-vis the panels. Fiss, *supra* note 298, at 2094.

[367] *See* William Honan, *Symposium Finding Fault With New Arts-Grant Law*, N.Y. Times, Nov. 10, 1990, A14, col. 1 (reporting of a convocation of arts administrators, public officials and attorneys convened by the National Assembly to evaluate the 1990 amendments). Joseph Papp, the Producer of the New York Shakespeare Festival found the amendments "unacceptable, reprehensible and insidious," and he therefore rejected NEA grants worth $323,000. Gerald Frasier, *Papp Rejects $323,000 in Endowment Grants*, N.Y. Times, Nov. 2, 1990, B3, col. 1

[368] William H. Honan, *Arts Council Turns Down Decency Rules for Advisors*, N.Y. Times, Dec. 15, 1990, A15, col. 3. During the time that Congress was seriously considering more restrictive versions of the 1990 amendments, Frohnmeyer had accepted the recommendation to the National Council that he reject the recommendation of the Panel on Special Museum Exhibitions that NEA fund an exhibition of the works of controversial artist Mike Kelley. No author, *Frohnmayer Rejects Grant for Boston Show*, N.Y. Times, Oct. 23, 1990, C16, col. 1. According to the Director of Boston's Institute for Contemporary Art, the location of the proposed exhibition: Mr. Kelley's work "deals with serious and critical issues within our cultural, some of which deal with the pathology of our times, some of which deal with the body and references to sexuality and sociology, some of which deal with nationality and nationalism, some of which deal with madness and particular forms of modern schizophrenic behavior." [No author], *NEAs Chief Rejects Grant to Boston Museum*, L.A. Times, Oct. 22, 1990, pt. P, p. 10, col. 3. The Director speculated that "The only reason this grant was turned down after unanimous peer-review approval was that the Council and Frohnmayer feared that the work would be politically unacceptable." [No author], *Politics Cost Gallery Grant, Director Says*, Washington Post, Oct. 23, 1990, D7.

[369] Judith Reinraub, *NEA Approves Delayed Grants*, Washington Post, Jan. 5, 1991, C1. Frohnmayer personally reviewed the two applications to satisfy himself that the grants met NEA's criteria. *Id.* Ms. Hughes was not especially grateful for the grant:

> I refuse to be surprised by anything the NEA does. It seems to me that the endowment is like a rudderless ship. This might get tossed my way, but I think other

Advisory Council on the Arts, after meeting with NEA's General Counsel, unanimously declined to promulgate "decency standards" to aid in implementing the 1990 amendments.[370] To further assuage the doubts of the arts community, Frohnmeyer made several strong statements in speeches against government control over the content of publicly funded art.[371] Other observers were skeptical about the ability of the panels and the NEA Chairman to resist playing the censor's role. Professor Owen Fiss suggested that: "The risk remains great that, in the end, Helms will have his way, and grants will be denied by the endowment for projects like Mapplethorpe's on the ground of indecency, even though they cannot constitutionally be prosecuted criminally for obscenity."[372] Several artists and arts organizations challenged the "decency" provision of the 1990 amendments, and in 1992 a federal district court in California found it to be unconstitutional.[373]

If Frohnmayer's conciliatory actions failed to persuade NEA's critics in the arts community, they infuriated its detractors at the other end of the spectrum.[374] When NEA awarded two more grants to members of the NEA Four, Congressman Dannemeyer publicly called for Frohnmayer to resign.[375] After

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> artists whose identities are controversial—their race, their gender, their sexual orientation—are just going to be weeded out by the new internal changes in the NEA and the dissolution of the peer panels.

Barbara Gamarekian, *Arts Endowment Reverses a Stand*, N.Y. Times, Jan. 5, 1991, p. 9, col. 4.

[370] Honan, *supra* note 368.

[371] *See* David Johnston, *Lightning Bolts from Left and Right Can't Resist Arts Endowment Chief*, N.Y. Times, May 3, 1991, A12, Col. 1.

[372] Fiss, *supra* note 298, at 2095-96. *See also* Owen M. Fiss, *A Decency Czar: National Endowment for the Arts Censorship*, THE NATION, Vol. 252, No.14, p.473, April 15, 1991.

[373] Finley v. National Endowment for the Arts, No. CV90-5236AWT, 1992 U.S. DIst. LEXIS 8070 (C.D. Cal., June 9, 1992); William H. Honan, *Judge Overrules Decency Statute for Arts Grants*, N.Y. Times, June 10, 1992, A1, col. 2. *But see* Advocates for the Arts v. Thompson, 532 F. 2 (d) 792 (1st Cir.), cert. denied, 429 US 894 (1976) (upholding state's revocation of NEA-sponsored grant to journal after it published a controversial poem).

[374] Leonard Garment, one of the co-chairmen of the Independent Commission, was critical of Frohnmayer's lack of political sensitivity:

> [A]fter the [1990] funding crisis passed, behavior at the top of the Endowment did not change enough to make a difference. This fall Frohnmayer received a recommendation from the Endowment's Advisory Council that some of the avant-garde performance artists who had conspicuously angered endowment critics be given funds for more projects. He would not overrule it; the chairman's job—he gave me his principled explanation—was to overrule his council only if a recommendation met a quasi-judicial standard of clear and convincing error. The next day an Endownment staffer privately read me a string of phone messages received from staffers who were calling on behalf of the Endowment's most durable supporters in Congress. They all said more or less the same thing "Has he lost his mind?"

Leonard Garment, *"The Feds and the Arts: Where it Went Wrong,"* Washington Post, February 25, 1992, A17.

[375] Alan McConagha, *Another Showdown Looms as NEA's Critiques Cry "Smut,"* Washington Times, November 6, 1991, A1.

Presidential Candidate Patrick Buchanan made NEA a campaign issue in the 1992 Republican primaries,[376] the White House quickly asked for and received Frohnmayer's resignation.[377]

The NEA controversy erupted anew when Frohnmayer's replacement, Candice Radice, declined to fund two applications that had been approved by the visual arts peer review panel and one that had been recommended by the peer review panel for sculpture.[378] This prompted both panels to suspend their reviews of pending applications in protest.[379] Stephen Sondheim and Wallace Stegner turned down NEA medals of honor to protest the action, a grantee decided to turn his funds over to the rejected applicants,[380] and it began to look like there would be a mutiny of peer review panels. Radice argued that her actions should not be viewed as an attack on the peer review system, and she insisted that they were not the result of White House pressure.[381]

2. Feedback and Rebuttal

Although an NEA fellowship or grant may not be as critical to the career of an applicant as an NIH or NSF grant, it is still a significant plum. An NEA fellowship can do a great deal to enhance a musician's or artist's status in the art world, and this can have long-range economic consequences for the artist. Consequently, rejected applicants are very interested to know why their applications were not funded. Although the agency's rejection letter is typically a form letter that contains very little substantive information, NEA encourages rejected applicants to contact the program specialists assigned to their projects for explanations and suggestions for the future. An NEA staffer will usually provide reasons to rejected applicants who are considering an appeal, but only if specifically requested. A summary of the relevant panel's deliberations is available to any applicant that requests one,[382] but staff notes of panel meetings and minutes of those meetings are not routinely shared with applicants or any other outsiders. Tapes of panel meetings are never shared with applicants or outsiders. Prior to 1990, the portions of the meetings of the Advisory Council that were devoted to discussions of individual applications were closed to the public, but the Council in May 1990 decided to open these sessions to public scrutiny.[383]

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[376] John W. Mashek, *Buchanan Assails Sutra Nomination: Also Criticizes Arts Subsidies*, Boston Globe, February 21, 1992. p. 10.

[377] Editorial, *Curtains for Mr. Frohnmayer*, Washington Post, February 25, 1992, A16.

[378] Maryann French, *Second Arts Panel Walks Out*, Washington Post, May 21, 1192, D1; Blair Kamin, *In First Week, Acting Chairwoman Starts Steering NEA to the Right*, Chicago Tribune, May 10, 1992, p. 3. The rock group Aerosmith came to the rescue with a $10,000 grant to fund the show. Patti Hartigan, *Aerosmith Takes Aim at the NEA*, The Boston Globe, May 20, 1992, P. 1.

[379] Patricia C. Johnson, *NEA Sculpture Panel Suspends Work*, Houston Chronicle, May 16, 1992, p. 3.

[380] Jon Robin Baitz, a 30-year-old playwright, accepted a $15,000 grant from NEA and announced that he would make two donations to two institutions that were denied $10,000 grants. Alex Witchel, *Arts Grant Winner Donates to Losers*, N.Y. Times, June 2, 1992, B1, Col. 1. *See also*, George F. Will, *Moral Preening as an Art Form*, Washington Post, June 7, 1992, C7 (criticizing the action).

[381] Kim Masters, *NEA Chief Defends Grant Vetoes*, Washington Post, May 29, 1992, D1.

[382] Comments of Michael McLaughlin, *supra* note 227.

These efforts at providing feedback do not nearly approach the willingness of NIH and (more recently) NSF to provide reasons to rejected applicants and suggestions for improvement. There is, for example, no equivalent in NEA to the NIH "pink sheet" containing a summary of the panel deliberations that is routinely mailed to all applicants. NEA cites two primary reasons for its reluctance to provide reasons to rejected applicants as a routine matter: (1) the subjective nature of panel determinations in the arts; and (2) the extra workload that it would place on the staff.[384] Although the latter explanation may have some merit, the former is unacceptable, and it goes a long way toward explaining recent criticism of NEA's grantmaking process. If the subject matter of a panel's deliberations is so subjective that the panel's reasons for funding one project and rejecting another cannot be articulated in a way that is understandable to the rejected applicants, the value of peer evaluation itself is open to serious question. There is a very fine line between an unexplainable decision and an arbitrary one. Absent an explanation, neither the rejected applicant nor the public that pays for the funded projects can know whether the panel behaved arbitrarily or behaved reasonably in a way that could not be explained. In other words, NEA is demanding that rejected applicants and the public trust the *process* completely. In a time in which NEA comes under yearly attack from determined critics, this may be too much for the agency to expect.

3. Favoritism

As with all peer review programs, an NEA reviewer can play favorites by assigning a very high score to a particular proposal. In one NEA program, for example, a single panelist can guarantee that an application makes it to the third round of consideration by casting a "passion vote" for an artist for which he or she has a special fondness. Each panelist is informally given a limited number of such votes, and some use them more than others. Although these "passion votes" are intended to allow panelists to express especially well-formed opinions on the merits of the artist's work, they likewise offer an opportunity to enhance a particular artist's probability of success. Since an applicant must still garner the support of five out of seven or more panelists in the final round of voting, however, there is a relatively low probability that a proposal lacking artistic merit will be recommended for funding.

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[383] The Independent Commission on the National Endowment for the Arts, *supra* note 232.

[384] Comments of Michael McLaughlin, *supra* note 227.

4. Old Boy Network

Throughout much of its history, the NEA panel system has been criticized by outsiders for being an "old boy" network in which insiders impose their own arbitrary constraints on the art and artists who get funded.[385] Interestingly, unlike much of the criticism of NIH and NSF, this criticism does not come so much from rejected applicants, as from outside observers who are generally critical of the substance of NEA funding decisions. These criticisms reached a fever pitch during the recent Mapplethorpe/Serrano and NEA Four controversies.[386]

One NEA staffer interviewed for this report agreed with the contention of some outside critics that the agency is a "captive" of the panels. If the panels want to "look out for their own," there is little that the staff (or even the Chairman) can do about it. The high turnover rate of the panels that is now required by the 1990 amendments, however, helps reduce the probability that a coterie of "old boys" will effectively control the panel's decisions. Each panelist is chosen for only a one-year term and may not be appointed for more than three consecutive terms. Some panels have a 100 percent turnover rate. As one NEA staffer put it: "No matter who you are you are going to run out of your friends sooner or later." Another shield against "old boyism" is the agency's attempt to select panels that reflect geographic and cultural diversity.[387] Finally, the nature of the subject matter can help prevent old boy networks from arising. Unlike scientists, artists and musicians are not so narrowly specialized that only 20 or 30 people in the country are qualified to judge the merits of all the proposals in a given field. For example, the available pool of experts to judge a saxophone ensemble probably includes saxophone professors from most of the major and many minor universities, as well as most professional saxophonists.

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[385] *See* Allan Paracini, *National Endowment: Arts Agency: Living Up To Its Billing?* L.A. Times, Sept. 9, 1989, pt. 1, p. 1, col. 1 (citing Professor Kevin Mulcahy, Professor of Political Science at Louisiana State University for the proposition that the peer review system at NEA "has often tended to operate as a network serving the interests of well-connected artists that is hard for other artists to penetrate."); McLellan, *supra* note 8 ("There are cliques and friendships in the Arts and questions of artistic merit often overlap with questions of personal taste."); *National Endowments for the Arts is Honored as 20th Birthday Nears*, N.Y. Times, Sept. 1, 1985, sec. 1, pt. 2, p. 68, col. 1 ("The endowment has an insider-outsider working system. In a time of no expansion in the arts, younger artists are coming up against a middle-aged generation of arts administrators who make up the grant-giving panels.") (quoting Mr. Derek Guthrie, publisher of The New Art Examiner); *Can the Government Promote Creativity—Or Only Artists?* N.Y. Times, April 25, 1982, sec. 4, p. 6, col. 1 ("Decisions...about what's good and worthy of support are made centrally by people who sit on peer review panels who do represent one segment of the society. They are almost 99% previous or current grantees.") (quoting Ms. Arlene Goldbard, Co-director of the Baltimore-based Neighborhood Arts Programs National Organizing Committee); Lanquette, *supra* note 226 ("[T]he charge most often heard today is that these panels, rather than acting as government arbiters can work instead as 'old-boy' networks—passing out plums to friends and colleagues."); Richard Netzer, The Subsidized Muse (Cambridge University Press, 1978) ("Consciously or not, some [peer review] panels amount to 'old boy' networks that respond favorably to applicants who are part of that network.").

[386] See, e.g., Robert H. Knight and John M. Slye, The National Endowment for the Arts: Misusing Taxpayer's Money, Heritage Foundation Reports, Jan. 18, 1991, Backgrounder number 3 ("The peer-review process is a tightly-knit buddy system, with artists taking turns giving each other grants"); Jonathan Yardley, *Helms and the Art of Pragmatism*, Washington Post, July 31, 1989, C2 ("Rather than represent the public's interest, too many of these panels represent those of their own artistic and scholarly cliques, they dole out money to allies and proteges, feather their own nests and keep it all in the family.").

In spite of the changes, critics maintain that NEA continues to administer an old boy network that sends public monies to avant garde projects.[388] The nub of their criticism is that the NEA *staff* is responsible for selecting peer reviewers who will predictably reach predetermined results. In other words, the critics accuse the NEA staff of "stacking" the peer review committees with advocates of a single point of view.[389] While it is difficult to evaluate the validity of this claim, there are few built-in constraints against such manipulation of the peer review process.

5. Halo Effect

The "halo effect" identified at some of the scientific agencies seems to be less pronounced at NEA. In part, this is attributable to the very large number of applicants and the absence of a tradition of continuously funding any single individual applicant's grants. Only a very small number of individual grantees are funded for a second consecutive year. It also may stem from the fact that well-known artists are often much more highly paid in the private market and therefore do not stake a claim to NEA funds or do not vigorously devote themselves to the application process. According to one NEA staffer: "I have witnessed extremely well-known artists' work rejected because they had sent in slides of old work." Although panels are not supposed to consider the applicant's financial need in evaluating the quality of proposals, there is an unwritten rule that artists who do not really need the money should not ask for NEA's limited fellowship funds. The halo effect may, however, play a larger role in programs involved in funding large organizations, such as orchestras and museums.

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[387] Attempts to reflect geographic diversity stem from a rather consistent and strong perception among educated outsiders that the National Institutes for the Arts and Humanities are biased in favor of East Coast cities and schools. See, e.g., Paracini, *supra* note 385 (citing several prominent supporters of NEA who nevertheless believed that the Northeast has dominated in the competitions and for the proposition that NEA has not achieved broad ethnic representation). One especially strong adherent to this view was nominated, but not confirmed to be the Chairman of the National Endowment for the Humanities. He vowed that if confirmed, he would ensure that "[n]ot everything would go to Harvard, Yale, Princeton, and Chicago" and that "more grants [would go] to Texas and Oklahoma." Carla Hall, *Bradford Speaks Out: NEH Chair Candidate on His Program Plans; Bradford on the NEH*, Washington Post, October 28, 1981, B1.

[388] *See* text accompanying notes 305-307, *supra*.

[389] Frequent NEA critic, Richard Grenier claims that "'Peer review panels'...are stacked, a joke." Richard Grenier, A Vote to Bring Back Guillotine at NEA, Washington Times, April 4, 1991, pt. G, p. 61. Grenier offers no empirical support for this proposition, but it seems to be widely held by culturally conservative critics of NEA.

6. Personal Animus

NEA has received frequent complaints that the Chairman or the Council has rejected applications because of a dislike for the applicant or some aspect of the applicant's lifestyle. During the NEA Four controversy, for example, applicants alleged that several actions taken by the Council and the chairman were motivated by animus against their homosexual lifestyles. Similar complaints have not, however, been lodged against the peer review panels.

7. Mavericks

NEA does not appear to have a problem with refusal to fund mavericks. Highly original projects are routinely funded, and creativity is perceived as a great virtue in the panels. The agency suffers considerably more criticism from the avant garde nature of some of its funding decisions. Indeed, some panel actions, such as the recommendation to fund a former prostitute named "Scarlet O" who decided that she would rather be known as a performance artist,[390] call into serious question the very professionalism upon which the peer review process critically depends.[391]

8. Applicant Anonymity

Some programs at NEA attempt to maintain applicant anonymity to some degree. In some fields that have a tradition of "blind judging" and in which applicant anonymity is practicable, that technique is often used to provide an additional element of objectivity to the grants process. For example, peer review panels for some music programs typically rely upon tapes of applicants' performances in which the identities of the performers are not revealed until after all the tapes have been evaluated and compared. According to one NEA staffer, the pendulum appears to be swinging toward more blind judging in all of the programs where it is feasible.

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[390] Todd Allan Yasui, *Defending NEA's Vetos*, Washington Post, February 10, 1992, B7 (in a videotape of one of her performances, Ms. O discussed gender, stripped, and invited members of the audience to rub lotion on her body).

[391] *See* Walter Berns, *Saving the NEA*, NATIONAL REVIEW, Vol. 42, no. 22, p. 34, Nov. 19, 1990 (complaining that "the Arts community insists that everything produced by someone claiming to be an artist is in fact a work of art.").

In other areas, the panelists resist blind judging. For example, applications in the area of paintings could probably be evaluated blindly. The quality of submitted examples of the artists' works could be evaluated without necessarily knowing the name of the author. The panelists, however, believe that since most artists who apply for grants are not known by name to the panelists, the evaluation is essentially anonymous in any event. In addition, blind evaluation could work mischievous results in cases of highly derivative works in which the student's works may be mistaken for the teacher's. Finally, blind evaluations do not allow panels to take into account subtle timing questions involving the impact that support might have on the artist's work at some particular stage in the applicant's career.

9. Reviewer Anonymity

The names of each year's group of around 800 panelists are made public at the time the panelists are appointed, but NEA does not otherwise routinely publicize the identities of the panel reviewers. The agency will, however, make the identities of panelists available upon request after the reviews are completed. Panels that use "primary reviewers" to conduct intense reviews and report back to the panel, however, do not reveal the identities of primary reviewers to applicants. All panel meetings and, until recently, portions of meetings of the National Council on the Arts were held in private. This secrecy has always engendered criticism from rejected applicants.[392] But it is vigorously defended by the professionals that sit on the panels.[393]

10. Financial Conflict of Interest

Prior to the 1990 amendments, NEA received a great deal of criticism about the extent to which panelists encountered at least indirect conflicts of interest.[394] NEA's regulations prohibited an applicant from sitting on a panel that considered the applicant's proposal, but they did not prevent the panelist from sitting on a panel that considered an application from his or her institution, so long as the panelist left the room during the consideration of that application.[395] NEA revised its conflict of interest regulations in light of the 1990 amendments to prevent any person who is an applicant or a representative of an organizational applicant from serving on a panel that considers that application. In addition, persons who are employed or associated with an organizational applicant may not serve on the panel that evaluates its application. Panelists may receive remuneration from activities supported by NEA only to the extent specified in the application prior to its consideration, and they may not participate in decisions with respect to that application.

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[392] Glueck, *supra* note 294 ("Endowment applicants have long complained about the secrecy of the panels.").

[393] *See* Beeb Salzer, *Politicians Need Maturity, Tolerance, and Strength in Nurturing Art*, L.A. Times, July 24, 1988, pt. 2, p. 2, col. 1 (Ms. Salzer is a Professor of Drama at San Diego State University) ("All of the ranting, pleading, negotiating, and evaluations that are part of the selection for arts grants are best handled by experts away from the spotlight.").

[394] *See* Knight and Slye, *supra* note 386; Joyce Price, *NEA Grant Procedures Need Fixing, Says Panel*, *Washington Times*, Sept. 11, 1990, A5; Paracini, *supra* note 306. Similar conflicts have been noted in state arts councils. *See* Chris Pasles and Herman Wong, *Arts Council Doling Out Funds Today*, L.A. Times, Aug. 28, 1987, pt. 6, p. 1, col. 2.

[395] NEA Standards of Conduct, *supra* note 277, at 6.

11. Research Conflict of Interest

Prior to the 1990 Amendments to its statute, NEA's regulations did not prevent a person employed by an applicant from judging the application of competing organizations. Even though not present when the application from his or her organization was being considered, the panelist still knew that a low rating for the competitor would leave the competing organizations in a relatively better position overall. According to one high level NEA staffer, NEA received applications from "dire competitors," and although the panelists attempted to police themselves, the appearance of impropriety was hard to avoid when the organization whose employee was on the panel received a large grant, and the competitor was not funded.

The agency staff attempted to deal with such conflicts informally. For example, on one occasion when the Assistant Program Director observed a panelist intensely criticizing a proposal from a competitor organization, the Assistant Director attempted to steer the discussion away from the criticisms. When this failed, the Assistant Director suggested an early lunch. After lunch, the Program Director joined the panel and said nice things about the proposal to offset the previous negative comments, and the proposal was recommended for approval.

The 1990 Amendments met the problem of research conflict of interest head on by flatly prohibiting a person from sitting on a panel that evaluates the applicant's proposals or those from the institution that employs the applicant. Although this necessarily reduces the supply of qualified experts for panels, Congress correctly concluded that it was a necessary step to preserve the public perception that the programs were being run fairly. The informal approach depended upon the ability of the panelist to detect the threat to impartiality posed by his or her consideration of a proposal from an organizational competitor and upon the applicant's willingness to do something about it. The staff attempted to repair in an ad hoc and informal way the damage to the process caused by panelist improprieties, but this depended too heavily upon the ability of the staff to identify the conflicts, and it was not always feasible to offset the effects of the prior bias.

The other aspect of research conflict of interest, (appropriation of ideas) may not be as fully applicable to the arts as to the sciences. It is, of course, possible for an artist or musician to steal an idea from another and use it to his or her own advantage.[396] But it would be difficult to arrange such a theft in the context of the NEA grant application process, because the projects are either simply fellowships to pursue a broad activity or discrete projects that are described with such generality that the kernel of the underlying idea usually cannot effectively be appropriated.

12. Peremptory Challenges

NEA does not currently let applicants review lists of potential panelists to identify persons with a potential bias. One very high-level NEA official interviewed for this report, however, expressed the belief that "peremptory challenges" could go a long way toward ensuring against bias in the NEA peer review system. The concept could be relatively easily implemented in most NEA panels, because they are chosen from a large number of prospective panelists. With a large number from which to choose, the quality of the resulting panels should not suffer significantly from the implementation of a process allowing peremptory challenges.

13. Lobbying

Most institutional applicants place many of the Council members on their mailing lists to receive promotional literature, newsletters, etc., but they do not often make direct overtures to Council members with respect to pending grant applications. Rejected applicants occasionally communicate with panelists after-the-fact, though rarely before the application is considered. The staff prefers that disappointed applicants deal directly with the staff, and not "go over their heads" to Council members. Applicants respect this wish for the most part.

14. Political Pressure

NEA receives many letters from congresspersons and others in support of particular projects, but the staff does not immediately share these with the panelists or Council members. They are usually placed in the applicant's file and answered with a polite reply describing NEA's peer review process. Because the challenge grants are much larger, outsiders attempt to communicate with the Challenge Grants Program Director more than with other Program Directors. They do not, however, use arm-twisting tactics. Any letters received from outsiders, including congresspersons, and memoranda of telephone conversations are placed in the applicant's file, and they may be read by panelists and members of the Advisory Council. In practice, they rarely are consulted in the vast majority of NEA programs. On the other hand, the NEA Four controversy clearly demonstrated that political considerations do play an important role in decisions about controversial applications that may be considered indecent or offensive.

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[396] When asked why prominent scholars would voluntarily devote so much time to serving on NEH panels, one scholar volunteered: "I find this an excellent way of finding out what's going on in research. Even if a proposal isn't good, I learn something about that field from the discussions with the other panelists. And serving is part of my professional responsibility to other scholars." Felicity Barringer, *Scholars Weigh the Allocation of Billions*, Washington Post, September 11, 1981, A17. Although the quoted panelist did not suggest that he would attempt to steal another's ideas, it does suggest that the potential is there, even in less commercial world of the arts.

15. Efficacy of Appeal Procedures

Rejected applicants may formally appeal to a Deputy Chairman of NEA, but only on relatively narrow grounds.[397] Appeals based on artistic merit are not entertained. In practice, most appeals are of the latter variety, and are therefore given short shrift. Tapes of panel meetings are preserved for two years for use in possible appeals. From the tapes, the staff can glean whether the criteria that guided the panel were within those detailed criteria that the agency published in advance.[398] It is not clear, however, how the applicant can directly ascertain whether irrelevant criteria were used.

In cases where the applicant does discover that irrelevant criteria were used, the Chairman can reverse the panel. For example, an applicant for a music performance grant for a saxophone ensemble obtained a summary statement of the panel's deliberations and ascertained that a primary reason for rejection was the panel's belief that the ensemble should only play music that was originally written for the saxophone, and not transcribed from music written for other instruments. Because this was not a relevant consideration under the Program's published criteria, the Deputy Director sent the application back to the panel for reconsideration at its next meeting. One irrelevant criterion that occurs with some frequency is whether the applicant organization has a "need" for the money.

Apparently, there is an additional informal appeals procedure for decisions by the Chairman not to fund a project that has received the endorsement of both the relevant peer review panel and the National Council on the Arts. In the first case in which the Chairman took this action, vetoing a proposal to use plants that absorb toxic metals to clean a hazardous waste site,[399] Chairman Frohnmayer agreed to meet with the rejected artist to discuss the reasons for his action. After the meeting, Frohnmeyer reversed his decision, explaining that he had been persuaded that the project, which initially seemed more appropriate for EPA funding, had artistic value.[400]

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[397] *See* text accompanying notes 289-292, *supra* (description of formal appeals process).

[398] Probably the most frequently relied upon irrelevant criterion is need. It is not for the panels to decide whether the applicant really needs the money or is already wealthy enough.

[399] William Honan, *U. S. Arts Chief Overturns an Approval*, N.Y. Times, Nov. 27, 1990, B3, col. 1.

16. Conclusions

It seems reasonably clear that the controversy over NEA is not over. The tension between the inevitably elitist concept of artistic excellence and constant demands for democratic accountability is likely to continue as long as the agency remains willing to fund grants in controversial areas. The peer review model is at the heart of the decisionmaking process and will therefore no doubt remain at the center of the controversy. More than any other agency studied for this report, NEA's peer review procedures have been criticized in the press and in other public forums such as congressional hearings. Yet past and present NEA officials continue to defend the peer review process that has evolved within that agency. Former NEA Chairman Frank Hodsell noted: "We may not have a perfect balance, but we have several checks. Program directors submit two, three, or four names for every slot; we look at them from the point of view of geographical distribution, we try to ask all the right questions. But we never do a perfect job."[401] One high level staffer argued that although the agency has an elitist image in the popular press, it in fact serves a very broad public primarily at the local level: "In fact, our grants touch everything and everyone. A grant to an artistic program of any type in a community spreads and affects the whole community, becomes part of the educational system."

VI. The Potential for Bias in Peer Review

Although the funding decisions of the scientific and artistic granting agencies in the United States are theoretically bound by objective criteria, the preceding chapters have demonstrated that there is room for bias in the process. The extent to which bias actually affects individual outcomes is a difficult empirical question that has been examined periodically, but has never been resolved. While this Part does not purport to answer that question definitively, it will draw upon the existing literature and the experiences of the four agencies related in Parts 2-5 to explore the *potential* for bias in the peer review process and to suggest the ways in which bias in the system can yield undesirable outcomes from a societal perspective.

Almost all the researchers and grants administrators interviewed in connection with this report agreed that bias was not a pervasive problem in NIH,

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[400] Kim Masters, *NEA Grant Reversal Scene: Chairman Set to Approve Project He Rejected*, Washington Post, Dec. 21, 1990, D2.

[401] Glueck, *supra* note 294.

NSF, and EPA.[402] The evidence of bias in NEA is somewhat stronger. For a long period of time that agency allowed panelists to sit on panels that reviewed applications from their own institutions and from their friends and close associates, and some outside critics discerned a strong pattern of "old boyism" in the outcome of the granting process.[403] Yet most complaints of bias in the peer review system at NEA have come more from outside critics who are dissatisfied with the results and may have their own axes to grind.

The lack of direct empirical evidence of actual bias in the granting agencies studied here is not especially surprising, because bias is not especially susceptible to empirical validation. Even the potential for bias, however, bears careful examination, because the public perception that a grants process in which public funds are at stake is biased can erode public support for the program and ultimately result in its decline or demise. The following discussion reviews the categories of bias that were developed in Parts 2-5 and suggest how bias can detract from sound decisionmaking and reduce public support for federal grant programs.

A. Animus

In a grants program that is able to fund only a small number of meritorious applications, a single bad review can prove fatal to a grant proposal.[404] The person who is the object of personal animus on the part of a peer reviewer is obviously adversely affected, because his or her chances of receiving the discretionary grant are thereby reduced or eliminated. That person can legitimately complain that he or she has been treated unfairly. In a broader sense, animus runs counter to the public interest in awarding grants to the most deserving applicants through an objective application of the statutory or regulatory criteria. A single, isolated case of animus will probably not prove very damaging to programs in which many qualified applicants contend for a limited supply of discretionary funds. But if the bias is manifested against whole groups of people or if a significant number of those in the potential pool of applicants perceive that the system could be unfairly abused to discriminate irrationally against them, potential applicants may be discouraged from applying for grants in the future. More subtly, in order to avoid a single negative assessment, proposal writers may begin to submit bland proposals for inoffensive studies that do not advance scientific knowledge or artistic creativity to any significant degree.[405] Similarly, public support for a system that consistently blackballs qualified applicants for reasons unrelated to the statutory or regulatory criteria will probably erode over time. Fortunately, the description of the peer review process in Parts 2-5 revealed very little evidence of personal animus in the agencies studied here.[406]

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[402] After an intensive investigation into the peer review process at NSF in 1976, a House investigatory subcommittee concluded:

> No method superior to peer review has been found for judging the scientific competence of proposers. Scientific peers are better able than others to judge the design of proposed work, the importance of proposed work to the scientific field, and the past performance of the proposer. Appropriate peer review procedures generally lead to the support of proposals in a high quality range. Using peer review procedures the Foundation has successfully fostered significant advances in basic science over the past 25 years.

1976 House Hearings Report *supra* note 3. A more recent report of a "Merit Review Task Force" assembled by NSF concluded: "The system is remarkably fair and is an effective mechanism for identifying and funding high-quality proposals in every discipline the Foundation supports. Many consider it to be the best system in the world." Report of the Merit Review Task Force *supra* note 100, at 1.

Two perceptive observers of the peer review process in the scientific agencies, Chubin and Hackett, accurately complain that the criticisms of peer review that periodically surface in the popular media are both frustrating and unsatisfying:

> They are frustrating because they reflect limited view points or special interests that do not provide a comprehensive perspective. They are dissatisfying because, in their brevity, they address issues selectively and often offer scant empirical or logical support. Even the best of them are but a lone scientist explaining how he or she has been mistreated, then generalizing from that experience to a set of universal principles.

Chubin & Hackett, *supra* note 2, at 33-34.

[403] *See* Part 5, at n. 162.

[404] As one very successful NSF applicant observed, "[a]ll one needs is one unsubstantiated or emotional comment by one reviewer to significantly lower one's chances." Chubin & Hackett, *supra* note 1, at 78. Another close observer of the peer review process noted that "in the present climate of opinion, a colleague who knows that he or she has the certain power to doom [a] proposal by a checkmark in the "Fair" or "Good" category - even if accompanied, albeit inconsistently, by written praise - might well be

There is an animus of a less personal sort that seems to pervade the peer review process in the scientific agencies. Peer review panels in NIH and NSF are often accused of being biased against "maverick" proposals that reject the conventional wisdom of the mainstream scientific community.[407] Thomas Kuhn

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inclined to use it." R. Roy, *Alternatives to Review by Peers: A Contribution to the Theory of Scientific Choice*, 22 MINERVA 316, 319 (1984). Many other applicants and reviewers interviewed for this report expressed similar views.

[405] Chubin & Hackett, *supra* note 3, at 76 ("The lesson is clear, ...a writer must please all of the reviewers all of the time, and be especially careful never to offend any of them.").

[406] Congressional hearings into the peer review process at NSF conducted in the summer of 1976 produced some limited testimony of the existence of "bias against someone a reviewer knew and disliked or disagreed with." 1976 House Hearings Report, *supra* note 3, at 33. NEA has received some complaints that the NEA Chairman or the Advisory Council on the Arts has rejected applications because of a dislike for the applicant or some aspect of the applicant's lifestyle, but these accusations are virtually never directed at the peer review panels.

[407] In a 1986 survey conducted by NSF of almost 10,000 academic scientists, almost two-thirds agreed with the statement that "NSF is not likely to fund high-risk exploratory research because the likelihood of obtaining favorable reviews is slim." National Science Foundation, Final Report: NSF Advisory Committee on Merit Review (1986). *See also* Bjerklie, *supra* note 105. In a survey of successful and unsuccessful applicants at the National Cancer Institute, 60.8% agreed with the proposition that reviewers were reluctant to support unorthodox or high-risk research, while 17.7% disagreed and 21.4% were neutral. Chubin & Hackett, *supra* note 1, at 66, Table 3. A former Vice-President for Research at the Massachusetts Institute of Technology testified in 1979 that the peer review process discriminates against new interdisciplinary science and scientific thinking that is not "au courant" even though creative and ripe with "unusual possibilities for breakthroughs." L. Carter, *A New and Searching*

has observed that scientific revolutions occur when a few scientists begin to reject the dominant "paradigm" or conventional wisdom of the scientists who work in the field. The conventional paradigm is accepted in the literature and in the classroom, and it produces the background assumptions that facilitate scientific dialogue. As bits and pieces of data are reported that cannot be explained by the conventional paradigm, however, a few practitioners are forced to reexamine the background assumptions and some begin to reject the paradigm, at least in some contexts. Adherents to the old world view invariably resist challenges to the conventional paradigm, but sooner or later the mounting evidence produces a scientific revolution in which the dominant paradigm is rejected and a new paradigm takes its place.[408]

An important battleground in the war between the paradigms is the discretionary grants process. The most frequently identified bias among the scientists interviewed for this report was the subtle bias that the scientific peer review bodies exert against "mavericks" who reject assumptions and approaches of the dominant paradigm.[409] Almost all observers of the process agreed that mavericks have a much lower probability of receiving funding than those who submit proposals well within the bounds of conventional wisdom. This is not so much a matter of personal animus against particular applicants as it is a matter of ideological self-defense. People who have spent their careers conducting research aimed at bolstering and extending the dominant paradigm are reluctant to direct resources toward research aimed at destroying that paradigm.

B. Tunnel Vision

Just as peer review panels tend to be biased against mavericks, they often exhibit tunnel vision with respect to whole categories of proposals that appear to lack relevance to professionals trained in a particular discipline or subdiscipline. This "tunnel vision" problem is partially a function of the composition of the peer review committees and partially a problem of ambiguity as to any particular panel's proper substantive bailiwick. The discussion in Parts 2-4 indicated that tunnel vision does appear to exist in the scientific agencies studied for this report.

Look at NSF, 204 SCIENCE 1064 (1979) (quoting testimony of Dr. Thomas F. Jones, Vice President for Research at MIT). *See also* 1976 House Hearings Report, *supra* note 3, at 27 ("If a proposal challenges the mainstream of scientific thought, the expert peer reviewer who is in the mainstream will tend to see the proposal as wrong on the face of it.").

[408] Kuhn, *supra* note 13.

[409] By contrast, persons interviewed in connection with this Report and outside observers of NEA reported no dissatisfaction whatsoever with NEA's treatment of mavericks. Indeed, many complaints went in precisely the opposite direction—that the agency funded too many "off-the-wall" proposals with little chance of success.

C. Favoritism

Favoritism adversely affects the public interest in several important ways. First, if favoritism plays a significant role in overall proposal ranking, the awards will not go to the most deserving applicants, thereby undermining the policies underlying the grant program. Second, if the perception grows that a grant program plays favorites, future applicants may be discouraged from applying. Finally, as the perception of favoritism spreads from the participants in the process to the public at large, public support for the program will no doubt dwindle.

1. Old Boyism and the Halo Effect

One of the most common complaints raised by participants in the peer review grants system is that it fosters an "old boy network" that subtly conspires to dominate the agency's evaluations. The closely related "halo effect" exists when peer reviewers fund poorly conceived projects by well-known scientists or scientists from highly regarded institutions purely out of regard for their past reputations, and not on the merits of their current proposals. Although complaints about "old boy" networks and the halo effect are frequently heard,[410] the empirical basis for such claims is relatively weak.[411]

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[410] A summary of the testimony presented at extensive 1976 congressional hearings on the granting process at NSF concluded that: "The most common objection to the use of peer review is that it is subject to 'backrubbing' or 'old boys clubs,' in which mutual friends unduly praise each other's proposals." 1976 House Hearings Report, *supra* note 3, at 22. In a 1986 survey of about 4,000 scientists conducted by a national science fraternity, 63 percent agreed with the statement: "Procurement procedure for grants to do governmentally sponsored research depends on 'who you know.' Many requests seem to be funded primarily because the researchers are already known to and supported by the granting organizations." Sigma Xi, A New Agenda for Science (preliminary report) (1986), reported in United States General Accounting Office, University Funding: Information on the Role of Peer Review at NSF and NIH 7 (March, 1987). In a survey of successful and unsuccessful applicants for National Cancer Institute grants, 39.5% of the respondents agreed with the proposition that "old boys networks" controlled the study sections, while only 32.7% disagreed and 27.8% were neutral. Chubin & Hackett, at 66, Table 3. The most strident critics of the peer review system characterize it as "an incestuous 'buddy system' that frequently stifles new ideas and scientific breakthroughs, while carving up the multimillion dollar Federal research and education pie in a monopoly game of grantsmanship." 1976 House Hearings Report, *supra* note 3 (testimony of Rep. John Conlan). Similar complaints are directed at funding in NEA, but mostly from critics who are not participants in the peer review system.

[411] A 1988 NSF study of 9,500 principle investigators found some slightly suggestive evidence of a perception of favoritism among NSF grantees. Consistently successful applicants were "more likely than the average applicant to be male, older..., and much more likely to be associated with a [prestigous research] institution," and 97% of them had served as reviewers or panelists, an indication of high status in the relevant research community. National Science Foundation, Proposal Review at NSF: Perceptions of Principal Investigators 10 (1988) [hereinafter cited as NSF Perceptions Report]. *See also* J. McCullough, *First Comprehensive Survey of NSF Applicants Focuses on Their Concerns About Proposal Review*, 14 SCIENCE, TECHNOLOGY, & HUMAN VALUES 78, 81 (1989). At the same time, consistently successful awardees "were more likely to have known the program officer and to have made some personal contact

A granting system run by a coterie of old boys discourages innovative proposals from bright applicants who have not found their way into the network. In the extreme, science and art are reduced to schmoozing. Old boy networks do not give all applicants a fair opportunity to secure funding, and a system that is not fairly run will gradually lose public support. It is less clear that the halo effect is counterproductive or unfair. To the extent that her halo has been earned by the production of excellent work over many years, the beneficiary of the halo effect is being given an opportunity to continue her productivity despite the fact that her most recent proposal is not well written or is poorly conceived. Some critics of the peer review system complain that it rewards the ability to write good proposals, rather than the ability to produce good research or art.[412] These critics believe that limited governmental funds should be dispersed in large multi-year grants to a very few scientists or artists who have the very best reputations in the relevant fields. They would, in other words, elevate the halo effect to a matter of principle. Others argue that an applicant's reputation should play a role in the process, but the dominant considerations should still be the quality of his or her most recent efforts and the content of the current proposal.[413] To do otherwise is to give hallowed elders an unfair advantage. In sum, whether agencies should take steps to reduce or eliminate the halo effect is a fairly debatable point.

2. Stacking the Deck

The agency staff can play favorites by "stacking the deck" with reviewers who will predictably fund the staff's favorites.[414] The extent to which staff

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before submitting a proposal." McCullough, *supra*, at 81; NSF Perceptions Report, *supra* , at 12. When the respondents who indicated dissatisfaction with the process (38% of all respondents) were asked to give reasons, they were somewhat more inclined to attribute any failure in the process to incompetent reviewers (18%) than to any cronyism, politics or an old boy's network (12%). NSF Perceptions Report, *supra*, at 14-16; McCullough, *supra*, at 82. In an independent survey of 719 applicants for NIH grants in fiscal years 1980-1981, 17.9% strongly agreed and 23.5% agreed with the proposition that "old boy networks control the RIGs or study sections," while only 23.1% disagreed and 9.7% strongly disagreed. G. Gillespie, Jr., D. Chubin & G. Kurzon, *Researchers' Cynicism and Desire For Change*, 10 SCIENCE, TECHNOLOGY & HUMAN VALUES 44, 45 (Summer 1985).

The empirical basis for the halo effect is also weak. A five-year study of NSF grants conducted during the late 1970s found no evidence that reviewers at "major" research institutions treated proposals from applicants at major institutions more favorably than did reviewers from lesser institutions. In fact, there was "a tendency in the opposite direction." Cole, Cole and Simon, *supra* note 126. The same study found only "low or moderate" correlations between actual funding at NSF and other indicators of the halo effect including academic rank, locus of Ph.D training, and previous NSF funding history.

[412] *See* Roy, *supra* note 6, at 73-81; Roy, *supra* note 404.

[413] This was the position taken by most of the agency staffers questioned on this issue.

[414] Several witnesses at the 1976 House subcommittee hearings on peer review in NSF agreed that agency staffers could achieve rough ranking outcomes by choosing particular reviewers with known predispositions, but there was little agreement on the extent to which this was in fact happening at NSF. 1976 House Hearings Report, *supra* note 3, at 31. According to one critic of peer review: "[t]he system is susceptible to manipulation by managers who operate under the emotional cover of the 'peer review' rubric

discretion in choosing panelists is a good or bad thing is, like the halo effect, a matter about which reasonable minds can differ. Most would agree that a panel that is a stacked deck will not necessarily make objective funding decisions and will be perceived as unfair. The staff has an obligation to ensure that panels are balanced, and indeed this may even rise to the level of a legal duty under the Federal Advisory Committee Act.[415] But one person's attempt to achieve balance may be another person's plot to stack the deck. It is, in other words, very difficult to know whether particular appointments are aimed at ensuring funding for favorites or for remedying imbalance in a committee already wedded to a particular point of view.

D. Conflict of Interest

1. Financial Conflict of interest

The scientific and arts communities apparently recognize the judicial principle that no person should be the judge of his or her own case, and regulations in all the agencies studied in this report preclude applicants from participating on panels in which their own proposals are evaluated.[416] Like animus and favoritism, financial conflict of interest can damage the public interest by discouraging qualified applicants from entering what appears to be a "rigged" system. A public perception that researchers are feathering their own nests with federal research dollars would almost certainly lead to reduced public support of government-funded research. Finally, it is simply immoral (and perhaps illegal) for an individual to appropriate another's ideas through the peer review process for private gain. Theft is theft, whether it takes place in the streets or in a committee room.

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so that individual proposals may be favored or disfavored simply by appropriate selection of the reviewers." Roy, *supra* note 6, at 73-81.

In agencies like EPA in which the chairman of the peer review committee chooses the panel members, the staff do not have an opportunity to stack the deck. The person that chooses the panel members, however, may still stack the deck with persons who are likely to fund his or her favorites. This may be more disturbing from a public policy perspective, because the entity exercising the most discretion is not an accountable government employee. Indeed, at the extreme, such delegation of governmental power to private institutions may raise constitutional concerns under the delegation doctrine. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[415] *See* Part 7, *infra*(discussion of applicability of Federal Advisory Committee Act to peer review panels).

[416] NIH Manual 4510, *supra* note 51; 45 CFR §684.11(g); NSF Proposal and Award Manual I-5 (1989). The proposals of panelists in NIH are reviewed by ad hoc panels assembled for that purpose. *Id.* at 5.

Most granting agencies are very sensitive to the financial conflict of interest problem, and they have promulgated regulations to shield against it.[417] The regulations typically ensure that no peer reviewer is in a position to review his or her own proposal or a proposal in which he or she has a financial stake. The regulations, however, do not always prohibit reviewers from evaluating proposals that are in direct competition with their own present or future applications, a matter that will be discussed in the next section.

2. Research Conflict of Interest

Even if the potential grantee recuses himself from the decision on his particular grant, he may have a financial stake in his evaluations of the remaining competing applications. Under the scoring systems that are typically used for allocating limited funds among members of a pool of qualified applicants, the chances of the reviewer's proposal being funded are enhanced if the scores of the competing proposals are held down.[418] In highly competitive fields like chemistry and biotechnology, any additional advantage in the great race to make a new discovery is useful.[419] The peer review process gives researchers access to the innovative ideas of other scientists and artists in their fields, and they can use those ideas in their own research. Indeed, it has been suggested that unshared access to the contents of grant proposals is one of the few small bits of compensation that a reviewer receives for the many hours that he or she devotes to the review process.[420]

The argument for allowing scientists to review competing proposals is that in some very narrow fields, there are literally no other people in the world qualified to provide an adequate peer review.[421] Under the well-recognized judicial doctrine of "necessity," a judge may hear a case in which she has a financial stake if any qualified judge would have the same stake in the decision.[422] Occasions for the invocation of the doctrine of necessity are exceedingly rare in the legal world, and they should be equally rare in the scientific and fine arts worlds. It is difficult to imagine that there are many legitimate fields of scientific inquiry or artistic expression that are so specialized that the only persons capable of understanding and evaluating grant proposals are current or prospective grantees of the same program.[423] In general, a person with a pending grant application or potential future application from the same pool of funds ought not sit in judgment over his or her competitors.

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[417] *See* Part 2, at note 63; Part 3, at note 33, Part 4, at note 33; Part 5, at note 53.

[418] *See* NSF Perceptions Report, *supra* note 411, at 24 ("In times such as the present, where the success rate on proposals becomes ridiculously low, the reviewers all become nervous and supercritical because they know that a positive review severely diminishes their own chances of funding."); Roy, *supra* note 6, at 75 ("Because of the absence of even simple procedures to avoid conflict of interest, scientists are often asked to judge the work of competitors, knowing that an excellent rating might jeopardize their own funding.").

Critics of the NEA grants process also complained bitterly of the fact that panelists could sit on panels that judged applications from their own institutions so long as they absented themselves from the consideration of those applications. These complaints inspired Congress to provide in the agency's statute that no person could sit on a panel that considered an application from that person's institution.

[419] Roy, *supra* note 404, at 319 (grant proposals are sent to "the set of colleagues who can most adequately evaluate the proposal but who also could use this same information in their own research.").

[420] *See* 1976 House Hearings Report, *supra* note 3, at 205 ("the most substantial 'rewards' for reviewing are those universally regarded as unethical or degenerate: theft or plagiarism of ideas, inside information that provides an advantage over colleagues, and a chance to forestall competitors or settle old scores.").

[421] Chubin and Hackett observe:

When information gleaned from the peer review process can be used to the appropriator's monetary advantage, the situation poses a clear financial conflict of interest. Even when monetary gain is not at issue, use of the peer review process to expropriate another's ideas threatens the integrity of the entire peer review-based grants process. Stealing another's ideas plainly constitutes a form of plagiarism, a brand of scientific misconduct that has found its way into the popular press with some frequency in recent years.[424] But it is an especially difficult form of plagiarism to detect and prove.

Applicants are likely to be more circumspect in sharing information with reviewers if they know that it may be used to advance the reviewer's reputation

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> In the worst case, the pool of appropriate reviewers may shrink to include only those likely to have a conflict of interest because they are so close to the proposer as collaborators or colleagues). Selecting reviewers from outside this pool would invite an incompetent, incomplete, or inappropriate review, yet within the circle of friendships, rivalries, and professional relations jeopardize the character and quality of reviews. Exacerbating these pressures is the shrinking pool of real dollars for research..., the increasing complexity of science, and the magnitude of competition for resources. The ethically difficult task of providing an objective, disinterested, reasoned review may soon be practically impossible.

Chubin & Hackett, *supra* note 3, at 80.

[422] For example, the doctrine of necessity applied when several federal judges challenged the failure of Congress to give all federal judges a raise. Since no federal judge lacked a financial conflict-of-interest, any judge could hear the case. Atkins v. United States, 556 F.2d 1028, 1036 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

[423] A frequent critic of the peer review system, Rustrum Roy, challenges the proposition that peer review must be narrowly limited to persons doing the same work as the applicant. The result is that:

> In the present system, the simplest precautions against conflict of interest are ignored. The system flies in the face of the most elementary knowledge of human nature and presupposes a level of objectivity, disinterestedness and honesty, such as never obtained in any human group.

Roy, *supra* note 404, at 318-19. Roy suggests that a better definition of peer is person of equal "rank" and "experience" in science, "drawn not only from the narrow specialty, but explicitly including neighboring fields." *Id.* at 318.

[424] For example, in 1989 the National Institutes of Health accused a prominent researcher at the Baylor School of Medicine of appropriating ideas from a manuscript that he was asked to evaluate as part of a pre-publication peer review for a scientific periodical. Michael Specter, *NIH Accuses Biologist of Stealing Ideas from Rival Researcher*, Washington Post, July 13, 1989, A16.

or, worse, used to deprive the applicant of the recognition that rightfully belongs to the applicant.[425] At the extreme, the researcher may decline to apply for grant funds until the project to be funded is nearing completion to ensure that any reviewers do not have an opportunity to get a "leg up" on the applicant.[426] Unlike financial conflict of interest, which is the subject of detailed regulations in many granting agencies, research conflict of interest is not explicitly regulated or even strongly discouraged. Of the agencies studied for this report, only EPA formally addressed this sort of conflict of interest in its guidelines, which provide that "no panelists will disclose or use to their own advantage any data, concept, research protocol, or any other idea included in the applications."[427] The guidelines do not, however, say what the consequences of disclosure or use will be.

E. Lobbying and Political Pressure

One very clear threat to the objectivity of the decisionmaking process is its susceptibility to *ex parte* lobbying by interested persons outside of the formal channels of communications. Not only is the *ex parte* attempt to bend the ear of the decisionmaker unfair to those applicants that cannot make equal claims to the decisionmaker's attention, but it also gives the appearance that the outcome of the process depends more on influence-peddling than upon the merits of the applications.[428] If *ex parte* lobbying plays a role in determining who gets discretionary grants, potential applicants without "contacts" within the granting agency or the peer review panels will be discouraged from applying, and the quality of applications will ultimately suffer.[429] Very similar considerations apply to attempts to pressure the decisionmaker by bringing in influential people from the Administration or Congress. Although high-level administration officials and congresspersons clearly have a legitimate interest in how the agency goes about distributing government dollars, an objective process must proceed on the basis of objective criteria, rather than anticipation of legislative favors or fear of congressional retaliation. Fortunately, there is little indication that *ex parte* lobbying, influence-peddling and outside political pressure play a significant role at any of the scientific institutions studied in this report.

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[425] *See* Darryl E. Chubin, *Open Science and Closed Science: Tradeoffs in a Democracy*, 10 SCIENCE, TECHNOLOGY & HUMAN VALUES 73-81 (Spring 1985) ("Because peers are usually defined by substantive competence, those playing the above roles are competitors. Every incentive exists to retain information that might benefit the other. Whereas the communal spirit would suggest 'we're all in this together,' peers are just as apt to set aside altruism and act 'selfishly,' i.e., to withhold information, at least temporarily, so that some competitive advantage, however transitory, is not lost.").

[426] Roy, *supra* note 404, at 319.

[427] Orientation Handbook, *supra* note at 181, at 5.

[428] For example few would hold out the discretionary grant process at the Department of Housing and Urban Development during the mid-1980s, where successful applicants had to secure the services of former high level administration officials to gain access to the "real" decisionmaking process, as a model for distributing government money in an objective fashion. *See generally*, IRVING WELFELD, HUD SCANDALS: HOWLING HEADLINES AND SILENT FIASCOES (1992).

[429] When universities began to bypass the peer review process at the major scientific granting agencies in the late 1980s to lobby Congress for direct appropriations for research projects, several prominent representatives of the academic research community passed resolutions opposing such "pork barrel" funding of scientific research. *See* Donald N. Langenberg, *Earmarked Appropriations: The Debate over the Method of Federal Funding*, 20 U. MICH. J. L. REF. 1029 (1987); *High Tech Goes into the Pork Barrel as Congress Helps Old Homestate U.*, 19 NAT. J. 1350 (1987).

F. Conclusions

In spite of the relative dearth of empirical support for definitive conclusions about the extent to which existing peer review grant processes have actually produced biased results, the system as currently implemented in the agencies studied here clearly does have a *potential* for systematic bias. Perhaps more importantly, the potential for bias has occasionally given rise to a public *perception*, stronger for some agencies than others, that bias infects the peer review process. While the potential for bias identified above is clearly not so great as to warrant abandonment of the peer review process or even dramatic changes, it may justify examining proposals for some modest improvements to the existing system.

VII. Conclusions and Recommendations

The peer review model that has evolved into the primary vehicle for awarding discretionary grants in the scientific community has proven remarkably successful and durable. The proof is in the pudding—the United States is a world leader in most areas of pure scientific research. Government-funded research has produced a storehouse of new knowledge, and past governmental expenditures have created an infrastructure of educated professionals and physical research capacity that should serve as a launching pad for still further scientific advances. The primary reason for this success is the intense dedication of the scientists who devote thousands of poorly compensated hours to reviewing grant applications and sitting through seemingly endless peer review committee meetings.[430] More important than the dedication of these volunteers is their integrity, which stems largely from a sense of responsibility to the "scientific community" that nurtures and sustains them. However nebulous the notion of a community of scientists is to the man on the street, it is very real to the professionals from academia and industry who practice science in their laboratories. A consciously biased vote in a peer review panel meeting is not only a lapse in personal integrity, it is a betrayal of the larger community of professionals. In words of the Director of one of NSF's large programs: "Our whole success is based on our credibility."[431] Hence, instances of bribery, logrolling, and other forms of chicanery that often accompany public discretionary grants programs are virtually unheard of in the context of scientific peer review.

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[430] 1976 House Hearing Reports, *supra* note 3, at 33 ("The value of the roughly 100,000 reviews contributed free to the [National Science] Foundation by the scientific community each year is thus in the range of $2,000,000 to $10,000,000.").

The peer review tradition is not as strong in the arts, social sciences and other professional areas. In the arts, where the public funding is a more recent phenomenon, the sense of community is less well-developed, and the criteria for evaluation may not be as objective. Yet because they recognize that peer review may be the only viable alternative to oppressive government-imposed content restrictions,[432] members of the arts community are also strong proponents of peer review. Although the peer review system seems to be working tolerably well in the arts, it has yielded results that have, to a much larger extent than in the sciences, attracted outside criticism from the lay public and politically powerful critics. To some extent, this is inherent in the subject matter. Congresspersons probably deem themselves more qualified to evaluate the quality of artistic proposals than to second guess a group of prestigious scientists.[433]

In spite of its obvious strengths, the peer review process has potential weaknesses. Some are inherent in the concept of peer review and cannot be changed without changing the character of the process. They are, in other words, necessary evils. Other weaknesses can be cured. Fortunately, there are several practical solutions to reduce the potential for bias and to eliminate the appearance of bias in the peer review process, but they all come with a price attached, either in the form of additional resources that must be devoted to the process or in the form of reduced efficiency.

At the outset, reformers should be wary of attempting to induce too many reforms into a system that is working reasonably well in most contexts. One of the mystifying aspects of peer review in the sciences is the fact that so many highly trained and extremely busy people are willing to devote so much time to the process for so little compensation. While prestige is an important form of compensation in the academic community, reforms that add to the reviewers' burdens may offer a further disincentive to undertake an already not-so-attractive task. According to some staffers in the scientific agencies, scientists are becoming less reticent to decline invitations to become peer reviewers, and it is therefore becoming more difficult to assemble panels with the right expertise to evaluate some applications. These problems may only multiply in the future as more academic scientists spend more of their time in lucrative consulting relationships. When the alternative to serving on a peer review committee is $200 per hour in consulting fees, prominent scientists may tend to opt for the latter alternative.

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[431] Telephone interview with Dr. Bill Harris, Director, Science and Technology Centers, National Science Foundation. Nov. 20, 1990. (202) 357-9808.

[432] Anthony Lewis, *Abroad At Home: Fight the Philistines*, N.Y. Times, June 8, 1990, sec. A, p. 31, col. 1 ("When politicians get into the business of deciding what is legitimate art, the game is up. That is why the NEA was originally set up in a way that insulated grant decisions from political pressure, with peer review committees playing a crucial role.").

[433] Public opinion polls on peer review in the arts are mixed. In a Gallup/Newsweek poll of 500 randomly selected adults conducted on June 23, 1989, 20 percent of the respondents had no opinion, 58 percent favored allowing expert panels, rather than federal officials, award the grants. On the other hand, a Los Angeles Times poll of 2,217 adults on September 20, 1989 indicated that "among those people informed about and supporting government funding, 43 percent preferred the 'public voting on which artists should get funding' to selection by a peer group of artists by 'other artists' (26%) or by 'government experts' (14%)." Gladys Engel Lang & Kurt Lang, *Public Opinion and the Helms Amendment*, 21 JOURNAL OF ARTS MANAGEMENT AND LAW 127, 133-35 (1991).

After examining the threshold question whether peer review should be abandoned altogether in favor of a "strong manager" model of grant allocation, this chapter will explore some possible "patch and repair" solutions to the bias problem and make some relatively modest recommendations for change. The fact that nearly all the changes suggested here have already been implemented in one or more of the peer review granting agencies studied in connection with this report suggests that most of them should not be unduly burdensome.

A. Advantages of the Peer Review Model

The peer review model's greatest strength is its ability to achieve objective assessments of competing proposals from highly qualified professionals with expertise in the area of interest.[434] When objective criteria can be articulated and applied by persons with training in the relevant field, peer review is an exceedingly effective vehicle for shielding the decisionmaking process from extraneous and inappropriate considerations. In addition, because the applicants are being judged by their peers (or in many cases their "betters"), they are generally inclined to accept the outcome. Indeed, the peer review system is a vehicle for rewarding excellence in the arts and sciences quite apart from the monetary support that comes from funding decisions.[435] Because it involves the input of many reviewers, it is generally not perceived as being autocratic or arbitrary. Finally, peer review helps to shield governmental decisionmakers from the political pressures that usually exist when a bureaucracy has the power to dole out public dollars. This is especially important in the arts, where the pressures to impose a narrow cultural uniformity on government funded art are great.[436]

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[434] 1976 House Hearing Reports, *supra* note 3, at 32.

[435] O'Rourke, *supra* note 312 (Peer review "is one of the few acts of approval and applause in the art world that is out of the market loop, beyond the reach of the gatekeepers and taste-makers, those who are involved in the commercialization of art.").

B. Peer Review versus the "Strong Manager" Model

The discussion of the peer review process in the foregoing chapters began with the assumption that peer review is the most appropriate decisionmaking model for dispersing government funds in the programs being described. It is therefore appropriate at the outset to consider the possibility of abandoning the process altogether in favor of an alternative model that might more efficiently lead to more objective results.

A host of alternative decisionmaking models exist. For example, funds might be allocated through a lottery in which the agency staff would screen all applications for an initial threshold showing of competence and relevance and then conduct a lottery to determine which of the meritorious proposals are funded. Although this process would be completely free of favoritism, animus, tunnel vision, conflict of interest, and outside pressure, it would not fulfill the programmatic goal of awarding limited monies to the "best" projects.[437] In situations in which society can place little confidence in the ability of human beings (even with considerable expertise) to select the "best" from among a group of otherwise acceptable alternatives, a lottery is an extremely efficient way to make the choice.[438] Although this kind of situation probably arises more often in governmental decisionmaking than most policymakers willingly acknowledge, scientific research grants is probably an area in which society can trust informed experts objectively to pick the best proposals from among a pool of good proposals. Whether the same confidence may be placed in the ability of experts to distinguish the best art and music from among a host of acceptable proposals is more debatable. At this juncture, however, Congress has elected not to fund the arts through a lottery. Despite a great deal of recent controversy over public funding to the arts, few would second guess this decision.

Assuming that it is possible to choose the "best" proposals in an objective way according to predetermined criteria, it does not go without saying that the entity making that choice should be a group of the applicants' professional peers. The most frequently mentioned alternative to peer review is the "strong manager" model in which highly trained government officials pick the winners and losers from among the qualified applicants with the aid of objective criteria and/or a formula. This model is familiar in the context of government contracts awarded on the basis of competitive bidding.

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[436] *See* Fiss, *supra* note 298. Vartan Gregorian, President of Brown University argues that

> Government money is not the government's; it's the people's. It needs checks and balances to be spent wisely, but that is why the peer-review panels are there."

Glueck, *supra* note 320. One might legitimately question Gregorian's conclusion that "experts" in the arts are the best judges of how the "people's" money should be spent. As Part 5 described, Congress has recently required NEA to appoint at least one lay person to each of its peer review panels. *See also* text accompanying notes 513-523, *infra*(suggesting that lay participation be expanded on peer review panels in all granting agencies).

[437] *See* Chubin & Hackett, *supra* note 3, at 198.

[438] *See* McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302 (1980); 28 USC §2112(a).

Rustrum Roy, a frequent and persistent critic of the peer review system in United States science, has suggested a formula-based strong manager model for funding scientific research. Under this model, the decisions would be made by permanent agency staff, rather than outside peers, but the staff's discretion would be constrained by Roy's suggested formula. The formula is based on the principle that grant applications should be submitted by institutional departments, not individual researchers, and be based upon the past productivity of the applicant institution in the relevant field. A department's productivity would be measured by the number of papers published in agreed-upon journals; the number of M.S. and Ph.D. degrees granted; the aggregate research support from all mission agencies for the faculty; and total support for research from industry.[439]

Roy's simple formula for determining the sum to be allotted to a department or interdisciplinary laboratory is as follows:

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[439] Rustum Roy, Peer-Reviewed Productivity-Based Formula for Funding University Research, reprinted in Research Project Selection Hearings at 24.

Dr. Ercole Cavilieri, a cancer researcher and well-known maverick at NCI, suggested a similar model for awarding discretionary grants in science:

> A scientist first learns how to do research in the process of obtaining a Ph.D. degree. If his or her supervising professor believes he or she is a strong candidate for funding, the professor nominates the graduate student for a post-doctoral assignment at the laboratory of another scientist. The student would have a supervisory committee both at graduate school and at the institution at which he or she had the post doctoral assignment. The supervisory committees would have an opportunity to observe both the intellectual capacity of the student and also his or her performance as a researcher. After a year or two of post-doctoral work, the student would be nominated by his or her graduate school supervisor for a research division grant. The committees and the professor would be expected to vouch for the student's ability to do high quality research. NIH would grant him a five year development grant. If the scientist has performed well after five years, he or she would be entitled to continuing support for so long as the researcher continues to produce an acceptable volume of high quality research.

Telephone interview with Dr. Ercole Cavalieri, Professor & Researcher at the Univ. of Nebraska Medical Center, Eppley Institute for Research in Cancer; Eppley Institute of Pharmaceutical Sciences, Nov. 15, 1990.

Total sum to be granted to unit =

A x (number of publications) +

B x (weighted number of advance degrees) +

C x (sum received for research from mission-oriented agencies) +

D x (sum received for research from private industry)

The weighting factors—A, B, C, D—would be adjusted by each agency so that the sum of the monies distributed to all institutions would be equal to the total budget.[440] If necessary an element of peer review could be incorporated into the system by allowing a panel of peers to evaluate the credentials and immediate past performance of individuals in the applicant department.[441]

1. Advantages of the Strong Manager Model

The strong manager model has numerous advantages over the peer review model. First, and most obviously, it is less expensive. The resources that are required to assemble peer review panels are available for funding research under the strong manager model. Prestigious and highly productive professionals, who would otherwise spend time writing proposals and engaged in peer review evaluations, could spend more time on their own research and other creative efforts. Especially in programs in which a very large number of qualified applicants are competing for a small number of grants, it seems wasteful to demand that productive professionals spend large amounts of time writing and evaluating proposals, no one of which has a high probability of success.[442] One prominent researcher complained to NSF that:

> The amount of time and effort spent on preparing proposals, reviewing them after inefficiently short periods, and administering them, is an astronomical cost in terms of science that is not getting done. When I observe my colleagues here in the United States I am saddened to see creative, trained minds,

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[440] Roy, *supra* note 404, at 322.

[441] Roy, *supra* note 439, at 24, 40.

[442] Roy, *supra* note 404, at 318. Roy uses the example of a decision in 1983 by the Department of Defense to allocate $30 million pursuant to research proposals from universities. This resulted in 2,200 proposals totalling $625 million. The peer review panel assembled to make recommendations about the applications necessarily spent a great deal of time evaluating proposals that ultimately could not be funded. *Id.* at 317.

> diverted away from productive research into huckstering.... This society is so super-competitive that the process of creativity is becoming swamped by constant evaluations. We are forced into presenting ourselves better and better, rather than doing more and better science. The peer review process has much to recommend it, but I suspect that we are overdoing it in a big (expensive) way.[443]

The strong manager model only requires a staff made up of competent, but not necessarily prestigious, professionals who are capable of applying the formula in a consistent manner.

Second, the strong manager model gives more emphasis to past productivity and less to the ability of an applicant to draft an attractive proposal. According to Rustrum Roy, "Only the most sanguine advocate unfamiliar with the literature would claim that there is any basis for expecting a correlation between a scientist's ability to present an essay and the actual future production of the 'best science'."[444] A National Academy of Sciences study of peer review in NSF did not find a high correlation between grants awarded and measures of the previous scientific performance of the applicants, and there was some indication that chance played a large role in grant awards under the peer review model.[445]

Third, the strong manager model eliminates the potential for research conflict of interest that exists in the peer review model. An applicant's competitors are not in a position to affect the outcomes of the applicant's proposals. Moreover, until the agency has made a final decision whether or not to fund a project, the applicant's ideas need not be disclosed to anyone other than the agency staff.

Fourth, the strong manager model can provide the continuity necessary for a sustained and successful research program. Institutions that produce high quality research on a continuous basis can be assured of continued funding over the long haul.[446] Researchers can pursue "chance leads" that arise in their research without fear that they will stray too far from the project that was funded.[447]

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[443] Merit Review Task Force, *supra* note 100, at 5 (the report does not identify the commenter).

[444] Roy, *supra* note 404, at 318. *See also* Roy, *supra* note 6, at 48. The recent report of the NSF Merit Review Task Force suggested that more attention be devoted to an applicant's past track record. Merit Review Task Force, *supra* note 100, at 15-16. The report cited favorably the model of the Natural Sciences and Engineering Research Council of Canada, in which proposals from established investigators focus more on the recent track record, while new investigators follow a different proposal format that emphasizes the potential for creative work.

[445] Cole, Cole and Simon, *supra* note 126, at 885. The study concluded that approximately twenty-five percent of panel decisions would be reversed by a different panel. "Since the reversal rate is about 25%, we may conclude that the fate of a particular grant application is roughly half determined by the characteristics of the proposal and the principal investigator, and about half by apparently random events which might be characterized as the 'luck of the reviewer draw.'" *Id.* *See also* Alan H. Clark, *Luck, Merit and Peer Review*, 215 SCIENCE 11 (1982) (arguing that this fact does not justify eliminating the peer review model for awarding grants).

Fifth, the strong manager model is appropriate for granting agencies with clearly defined missions that may vary from the policy preferences of the reviewers, who might become afflicted with tunnel vision. In such agencies, "the staff member can better judge the key issue of the importance of a proposed bit of research in fulfilling the mission's objective than can extramural experts."[448] Roy points out that proposal peer review is not used by mission-oriented agencies like the Department of Defense, NASA, the Bureau of Mines, or the Department of Energy. In particular, he notes that the highly successful Office of Naval Research and the Defense Advanced Research Projects Agency have never used peer review and continue to use a strong manager system.[449]

In sum, the strong manager model institutionalizes the "halo effect." The most heavily credentialed researchers would tend to get funding, whether or not they could write persuasive proposals. There would be an effective entitlement to funding until such time as the researcher demonstrated that he could no longer perform good research.

2. Disadvantages of the Strong Manager Model

Perhaps the greatest danger of the strong manager model is the very real possibility that agencies will award money for bad science to support a crony of upper-level appointees or to advance a particular political perspective. This problem, which is sometimes referred to as "staff abuse,"[450] seems endemic to grant procedures in which great discretion is placed in the hands of a few relatively unaccountable low-level governmental officials. EPA's experience in the early 1980s and the experience of the Department of Housing and Urban Development with discretionary grants in the mid-1980s should give pause to anyone who would advocate substituting politically appointed agency staff for peer reviewers.[451]

Because the strong manager model focuses heavily upon past accomplishments, it would tend to be biased against newcomers to a scientific field. Roy recognizes this potential and would shield against it by allowing any unit that adds new faculty members to receive one or more extra credits equal to the average research support for each faculty in the unit.[452] This does not, however, allow for the institution that desires to achieve prominence by building from the ground up, and it would make it very difficult to shift funding out of departments that become moribund.

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[446] According to Roy: "A great advantage of the [strong manager] system is that no step-function changes up or down are possible, preserving the continuity essential in long-term basic research." Roy, *supra* note 439, at 24.

[447] Roy, *supra* note 6.

[448] 1976 House Hearing Reports, *supra* note 3, at 39.

[449] Roy, *supra* note 6, at 47. For a brief description of the granting system at the Office of Naval Research in the 1970s, see 1976 House Hearing Reports, *supra* note 3, at 20.

[450] 1976 House Hearing Reports, *supra* note 3,at 25.

[451] *See generally*, Welfeld, *supra* note 428.

Institutionalizing the halo effect through the strong manager model would also tend to increase the disparity between "have" and "have not" institutions, because the best researchers tend to locate at the most prestigious institutions.[453] As a result one institution might well have several well-funded departments, while another received no funding at all. Over time this would become self-reinforcing, as faculty members with high potential gravitated to the departments that were most securely funded.

The efficiency advantages of the strong manager model should not be overemphasized. While awarding a smaller number of multi-year grants to a few departments would reduce the amount of resources devoted to the grant awards process at the front end, it might result in the adoption of more protective procedures at the back end when the granting agency sought to deprive an existing department of its grant at renewal time. The grants, in other words, might come to more closely resemble entitlements.

Finally, by placing heavy reliance upon publications, Roy's formula-based version of the strong manager model would to some extent simply shift the locus of peer review from the grants process to the private sector journal peer review process where governmental privacy and due process protections are not applicable and where there may be even fewer protections against bias.[454]

3. Conclusions

The case for wholesale abandonment of the peer review model for discretionary grants in the arts and sciences is far from compelling. In the main, peer review seems to be functioning quite efficiently, and the occasional criticisms of the process in practice do not appear to warrant rejection of the model.

Peer review works best in cautious programs in which incremental gains are expected and where accuracy is a paramount goal. Because it tends to result in bias against mavericks, however, it can be counterproductive in programs designed to explore fresh ideas and innovative approaches. Agencies that administer programs aimed at enhancing innovation should consider reducing or eliminating the role that peer review plays in awarding discretionary grants. One intermediate solution, therefore, would be to emulate NSF's recently adopted

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[452] Roy, *supra* note 6, at 79.

[453] *See* Chubin & Hackett, *supra* note 3, at 42.

[454] *See* Chubin & Hackett, *supra* note 3, at 201.

"expedited awards" program in which a small percentage of each Program's budget can be set aside for small grants of limited amount and duration without peer review. If the seed grants bear fruit, the mavericks should have a better chance to prove the merits of their ideas to skeptical peer reviewers in the next funding cycle. In 1989, an NSF appointed panel examined the recently implemented program and concluded that it was an excellent vehicle for funding "untested and novel ideas, ventures into emerging research areas, new expertise and approaches to 'old' topics, [and] new multi-disciplinary work."[455]

Recommendation

Agencies that rely upon peer review to evaluate grant proposals should consider setting aside a small portion of the available funds for awards to innovative proposals out of the mainstream based upon recommendations of the staff without peer review. Such awards should be of relatively brief duration, and should be subject to renewal only through the ordinary peer review process.

C. Openness and Accountability as Shields Against Bias

Bias can flourish in closed peer review systems in which panel meetings are conducted in private, mail reviews are unavailable for scrutiny and rebuttal by rejected applicants, and the relevant economic and research interests of the reviewers are not disclosed. By its very nature, peer review tends to be secretive and unaccountable to applicants and the general public. Two long-time students of the peer review process observe that:

> Peer review is an intensely private process that originates with a scientist's mind, continues on paper as a bureaucratic procedure and ends behind the closed doors of a funding agency. The process is at nearly all points inaccessible, opaque, and heavily infused with the values and interests of stake holders. Peer review leaves few clues in the public domain, and many participants in the system insist on minimizing public access to information.[456]

On the theory that "sunlight is...the best disinfectant,"[457] one relatively modest protection against bias in peer review is to open the process up to greater scrutiny by affected applicants and the public. The House subcommittee that studied peer review in NSF in 1976 recommended that NSF attempt to achieve "[t]he greatest degree of openness [in the] award-decision making process consonant with effective proposal evaluation and reasonable efficiency...."[458]

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[455] Quoted in Bjerklie, *supra* note 105.

[456] Chubin & Hackett, *supra* note 3, at 50.

[457] Louis D. Brandeis, Other People's Money 92 (1914) ("Sunlight is said to be the best disinfectant; electric light the most efficient policeman").

Parts 2-5 revealed that the peer review systems in NIH, EPA and NSF have evolved in the direction of greater openness and accountability, but some agencies have evolved more rapidly than others. The evolution in the scientific agencies toward greater openness has mirrored a general opening up of the bureaucratic process through the enactment of the Freedom of Information Act (FOIA),[459] the Federal Advisory Committee Act (FACA),[460] and the Privacy Act,[461] all three of which apply directly to various aspects of the peer review process in the granting agencies.

1. The Existing Legal Regime—The Freedom of Information Act, the Federal Advisory Committee Act, and the Privacy Act

The FOIA requires every federal agency to make available to any person any record in the agency's possession upon a request by that person that reasonably describes the record. This broad requirement, however, has several important exceptions. The exemptions most relevant to peer review in granting agencies are exemptions (4), (5) and (6). Exemption (4) includes "trade secrets and commercial or financial information obtained from a person and privileged or confidential," and exemption (5) covers "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption (6) applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[462]

The FACA requires federal agencies that rely upon recommendations of advisory committees to charter those committees.[463] The term "advisory committee" is defined functionally to include any committees that are "utilized" by federal agencies "in the interest of obtaining advice or recommendations for" those agencies. Peer review committees clearly come within this broad definition.[464] Each advisory committee's charter must set out the committee's objectives, duties, number and frequency of meetings, and termination date. Insofar as the Government in the Sunshine Act does not provide otherwise,[465] public notice must be given of all advisory committee meetings, they must be "open to the public," and interested persons must be permitted to attend and file statements.[466] The Government in the Sunshine Act allows an agency to close meetings or portions of meetings where an open meeting might result in disclosure of, *inter alia*, trade secret and commercial or financial information that is privileged or confidential, or information "of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy."[467] The agency must prepare minutes for advisory committee meetings and make those minutes available to the public, subject to the exemptions in the Freedom of Information Act.[468] Transcripts of advisory committee meetings must be made available to the public, subject to the same exemptions.[469]

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[458] 1976 House Hearing Reports, *supra* note 3, at 5.

[459] 5 USC §552.

[460] 5 USC, App. 2.

[461] 5 USC §552b.

[462] 5 USC §552(b)(4), (5), (6).

[463] 5 USC App. 2, §9(c). *See also* United States General Accounting Office, Peer Review: Compliance With the Privacy Act and Federal Advisory Committee Act (1991) (reporting that most agencies studied in the report chartered peer review committees as advisory committees under FACA).

[464] *See* Memorandum Opinion for the General Counsel, National Endowment for the Humanities, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, August 18, 1980 (mimeo, copy on file with author).

The Privacy Act requires federal agencies to protect personal information in agency files from unauthorized disclosure, to publish descriptions of the existence and nature of the records containing personal information about people, and to give individuals access to review and copy information about themselves and to demand that the agency correct any information that is not accurate, relevant, complete or timely.[470] The agency must either make the requested correction or inform the individual of its reasons for failing to do so. The agency must give an individual whose request is denied a right to review that decision within 30 days.[471] The Act, however, only applies to "systems of records" from which records are retrieved by the name of an individual or other personal identifier. This latter qualification has proven controversial and difficult to interpret. The Privacy Act also contains several exemptions, one of which is for "investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment [or] Federal contracts," but only "to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the government under an express promise that the identity of the source would be held in confidence."[472]

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[465] 5 USC, App. 2 §10(d).

[466] 5 USC, App. 2 §10(a)(1), (3).

[467] 5 USC §552b(c)(3), (4), (6).

[468] 5 USC, App. 2 §10(b), (c).

[469] 5 USC, App. 2 §11(a).

[470] 5 USC §552a(b), (d), (e).

[471] 5 USC §552a(d)(3). The review period may be extended another 39 days for good cause.

[472] 5 USC §552a(k)(5).

2. Reviewer Meetings

Most peer review granting agencies facilitate openness and accountability by holding open committee meetings. Open meetings allow outsiders to observe the decisionmaking process in action. Even when meetings are legitimately closed to the public to protect privacy interests or to preserve candor, each committee member has the opportunity to observe the demeanor of the others and to challenge their evaluations. A committee member who would play favorites or blackball an applicant must be prepared to meet the honest inquiries of his or her fellow experts on the committee. Hence, bringing all the reviewers together to discuss their opinions can in itself be a powerful shield against favoritism and animus.[473] All the granting agencies studied in this report provide for peer review panels, and some assemble more than one group of peers for a single round of evaluations.[474]

The principal disadvantage of panel meetings is the expense, both in terms of the resources required to bring the experts together and the valuable time of productive professionals consumed in travel and meetings. Meetings are almost always less efficient than one-on-one communications. In addition, because it will usually be more difficult for upper-level decisionmakers to reach results that differ greatly from a panel's unanimous recommendations, meetings can reduce the discretion of politically accountable decisionmakers.[475] Finally, meetings can facilitate old boyism and the halo effect, and they will not necessarily limit any tendency of peer reviewers to downgrade mavericks.

Nevertheless, the effort seems warranted in most cases. Where expense is a genuine constraint, alternatives exist to facilitate peer review meetings at very little overall cost. For example, it should be relatively inexpensive in the context of mail reviews at NSF to circulate written reviews to each of the reviewers and conduct a single conference telephone call to discuss and possibly amend the reviews. Such an informal meeting could greatly enlighten the agency staffer who must rank the proposals for upper-level decisionmakers. It could provide valuable feedback to the reviewers as to how their peers evaluated the same proposals.

Assembling the reviewers for a meeting will usually bring the process within constraints of the Federal Advisory Committee Act. With several important exceptions, meetings subject to FACA must be open to the public. Although it may be difficult to open telephone conference calls to the general public, it may be feasible to invite interested members of the public to listen to the contents of the conversations either in person or on tape. The extent to which the meetings should be open to the public and minutes and transcripts be made available to applicants and the public will be discussed below. The essential point here is that there is virtue in meetings, whether or not their contents are open to applicants and/or the public.

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[473] 1976 House Hearing Reports, *supra* note 3, at 37-38.

[474] NSF relies upon mail reviews without meetings for many of its programs, but the staff always has the option to assemble the outside reviewers for a meeting to discuss all of the proposals.

[475] *See* 1976 House Hearing Reports, *supra* note 3, at 38.

Recommendation

Agencies that rely upon peer review to evaluate grant proposals should generally assemble the reviewers for a meeting in which each reviewer has an opportunity to comment upon the evaluations of the other members in the presence of the other members. Such meetings may be arranged in person or by telephone conference call.

D. Feedback and Rebuttal

The decision not to fund a grant application can have serious consequences for an academic researcher's career. Younger scientists at prestigious institutions have no hope of becoming tenured if they do not have at least one NIH or NSF grant. The denial of a grant application to a more established researcher can result in the closing of his laboratory and effectively end his or her career as a productive researcher.[476] For some artists and musicians, NEA grants are a principal source of livelihood. A rejected applicant in any of these agencies understandably wants to know why the funding agency took that potentially career ending action. If the applicant discovers that a mistake was made in the evaluation, fairness demands that the applicant be given an opportunity to correct the error and to rebut the decision not to fund before the final funding decision is made.

1. Feedback

One of the most powerful procedural protections against bias is the requirement that the decisionmaker state his or her reasons.[477] Just as judges in the legal system are generally obliged to provide reasons for the exercise of judicial power, peer reviewers could be required to provide a statement of reasons to rejected applicants. A reasons requirement is, however, not a panacea. Any sophisticated observer of the legal and administrative process knows that an agency's statement of reasons can be a *post hoc* rationalization for a decision reached upon unarticulated or improper grounds. It is often easy enough for the decisionmaker to find the bottom line first and then come up with a rationale to explain that result. Still, forcing the peer reviewers to state reasons can enhance the acceptability of the decisions among the pool of rejected applicants and the reasons can help them improve future applications.[478]

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[476] *See* Kolata, *supra* note 18 (reporting statements made at a National Academy of Sciences Forum on the crisis in research funding); Booth, *Biomedical Scientists Cite Funding "Crisis,"* Washington Post, June 29, 1990, A25, col. 1 (same).

[477] See, e.g., International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1292 (1975).

The FOIA and the FACA require granting agencies to provide some feedback to rejected applicants as members of the general public. The Privacy Act goes beyond FOIA and FACA to make particular information about individuals available to those individuals even when that information need not be disclosed to the general public. Thus, the question whether feedback is appropriate has to some extent already been decided by Congress, and the granting agencies are obliged to follow the statutory directives.

The Privacy Act requires federal agencies that maintain a system of records in which the records of individuals are identifiable to allow individuals to review and copy information about themselves, and FOIA similarly requires agencies to provide copies of agency documents to any person. But neither statute requires that the agency generate any written information that it would not otherwise prepare; nor do they require the agency to maintain information in the applicants' files for any particular length of time. Thus, for example, an applicant for an EPA grant is theoretically allowed to see the written evaluations of individual reviewers, but the evaluations are in the agency's file only for as long as it takes the agency staffers to incorporate their substance into a "Summary Statement." Thus, as a practical matter, the applicant does not have access to the written reviews.

The FACA gives applicants the right to observe peer review committee meetings where outside evaluations are discussed, and it further requires that all "records, reports, transcripts, ...working papers, ...studies, ...or other documents which were made available to or prepared for" advisory committees be made available for public inspection.[479] But FACA also allows agencies to close advisory committee meetings to the public when necessary to protect trade secrecy and personal privacy, and the right to inspect documents is subject to the exemptions in FOIA.

The public availability of committee working papers, including initial peer reviews, under FOIA raises several complex legal issues, some of which have been answered in the seminal case of *Washington Research Project, Inc. v. Dept. of Health, Education and Welfare*.[480] In that case an organization sought information on eleven projects that NIH had funded through the National Institute of Mental Health to study the effects of psychotropic drugs on the behavior of children with certain learning disabilities. In particular, it sought the grant applications and information collected pursuant to the peer reviews. At that time NIH only publicized a list of research grants that were awarded, including a general description of the project and its budget. The agency claimed that all of the requested information came within exemptions (4), (5) and (6) of FOIA.

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[478] After conducting extensive hearings into the peer review at NSF in 1976, a House subcommittee recommended:

> The Foundation should include in each letter announcing a funding decision to an applicant either a statement of the methods and rationale of the decision or a statement that such information will be provided on request. 1976 House Hearing Reports, *supra* note 3.

[479] 5 USC, App. 2 §10(b).

The court of appeals first rejected the agency's argument that a grant application was protected from disclosure by the trade secret exemption (exemption (4)), noting that the exemption was "not necessarily coextensive with the existence of competition in any form."[481] Thus, despite the fact that the ideas contained in research grant proposals were the researcher's "stock in trade," they were not protected, because they were not commercial. The court concluded: "It is clear enough that a non-commercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce."[482]

In a footnote, the court noted that NIH regulations at that time precluded grant awards to for-profit institutions.[483]

The court held, however, that the pink slips and site visit reports (and presumably reviewer reports to peer review panels) were protected by exemption (5), the exemption for internal agency documents. Although a peer review panel was not itself a federal agency, it was "performing staff functions through the medium of outside consultancy.[484] Thus, while exemption (5) did not shield purely factual material, it did allow an agency to refuse to disclose "materials reflecting deliberative or policy-making processes."[485] Even purely factual matter could be exempt if it was "inextricable without compromise of the deliberative process."[486] Similarly, a summary of factual information that was part of the deliberative process could be withheld. Applying these statutory principles, the court concluded that most of the material in the site visits and pink sheets did not have to be disclosed. In particular, the factual material in the pink sheets was sufficiently connected to the deliberative process so as to preclude disclosure of any information contained therein.

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[480] 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975).

[481] 504 F.2d at 244.

[482] *Id.*

[483] 504 F.2d at 244, n. 6.

[484] 504 F.2d at 246.

[485] 504 F.2d at 249, quoting Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1973).

[486] 504 F.2d at 249.

FACA does not have a similar "internal deliberations" exemption, because the whole purpose of FACA is to open up such deliberations to the public. Thus, the primary rationale for declining to make peer review evaluations available to requesters under FOIA is unavailable to requests under FACA to attend peer review committee meetings and to have access to materials relied upon and discussed at those meetings. The *Washington Research Project* court's resolution of the trade secrecy question would seem to govern both FOIA and FACA requests, and thus preclude that rationale for limiting public access to peer review documents.

Recent developments, however, may have undermined the *Washington Research Project* holding on the trade secrecy issue. NIH has changed its policy of not funding private research enterprises, and some academic scientists have become wealthy as a result of research programs initially funded by NIH. In the booming area of biotechnology, lucrative partnerships and consultantships are no longer the exception to the rule that academic scientists are devoted, but poorly compensated, seekers of scientific truth. In short, it no longer "defies common sense to pretend that the scientist is engaged in trade or commerce." Yet even if the trade secrecy exemption may be applicable to some grant applications in the area of biotechnology, the *Washington Research Project* rationale would still seem to preclude using the trade secrecy exemption to shield from public disclosure peer review information about applications in other hard sciences, the social sciences and the arts.

The FACA, however, has an additional exemption for advisory committee consideration of matters for which meetings may be closed under the Government in the Sunshine Act—viz., information "of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy." This exemption is considerably broader than FOIA's exemption for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Arguably, peer review evaluations are "of a personal nature" to both the reviewer and the applicant. A reviewer's comments are personal in the sense that they do not reflect the ideas or assessments of other persons. On the other hand, the peer reviewers are constantly urged to evaluate the applications in their professional roles without regard to personal considerations, like the reviewer's friendship with the applicant.[487] Similarly, career-oriented information is generally considered professional, rather than personal, from the perspective of the applicant. If a reviewer's comments are of a personal nature, then the agency could reasonably conclude that disclosing them to the public would constitute a clearly unwarranted invasion of personal privacy. On the other hand, it is not obvious how disclosing the comments of other persons on the applicant's proposal constitutes a clearly unwarranted invasion of the applicant's personal privacy.[488] While the case for closing peer review panel meetings to the public under the FACA is plausible, it is not especially compelling.[489]

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[487] *See* Memorandum Opinion, *supra* note 464 (mimeo, on file with author) ("to invoke a Sunshine Act exemption, a more specific justification must be found to exist than merely a generalized need to protect candor in advisory committee deliberations").

Assuming that the granting agencies can shield most peer review information from public view, the Privacy Act may still require them to share such information with the applicants themselves. That statute requires agencies to give individuals access to review and copy information about themselves in agency files. The Privacy Act lacks the trade secrecy, internal agency deliberation and personal privacy exemptions, but it contains at least one exemption that may be applicable to peer review evaluations. Agencies may promulgate rules to exempt records that constitute "investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for civilian employment or federal contracts to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the government under an express promise that the identity of the source would be held in confidence."

This Privacy Act exemption would appear to be applicable to peer review documents concerning discretionary grant applications if the word "contracts" includes discretionary grants. Although the subject of great debate between the executive branch and Congress, this question has not been resolved by a court.

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[488] A memorandum prepared by the General Counsel of the National Endowment for the Arts found that resolution of the issue involved a balancing analysis:

> The subjects to be discussed with respect to applications for financial assistance could well include, for example, an applicant's abilities in his field, his reputation among his colleagues, and his professional background in performance. These topics would certainly appear to involve the type of personal information in which an applicant has a privacy interest. But the fact that an applicant has a legitimate privacy interest in a closed committee meeting does not end the inquiry. The agency must also determine that the privacy interest is not de minimis and is not outweighed by counterveiling interests in openness.

Memorandum Opinion, *supra* note 464 (mimeo, on file with author).

[489] The legislative history of the addition of the Sunshine Act exemptions to the Federal Advisory Committee Act is not especially enlightening. The Conference Committee Report speaks directly to the issue of peer review panels, but does not resolve it:

The conferees...are concerned about the possible effect of this amendment upon the peer review and clinical trial preliminary review systems of the National Institutes of Health. The conferees thus wish to state as clearly as possible that personal data, such as individual medical information, is especially sensitive and should be given appropriate protection to prevent clearly unwarranted invasions of individual privacy. Although the conferees are sympathetic to the concerns expressed by NIH...the conferees are equally sympathetic to concerns expressed by citizens groups that important fiscal and health-related information not be unnecessarily withheld from the public.

H.R. Conf. Rep. No. 1441, 94th Cong., 2d Sess. 26 (1976).

The American Law Division of the Congressional Research Service (CRS) has concluded that the word "contract" in the exemption does not include discretionary grants,[490] but the General Counsel of NSF has concluded that it does.[491]

NSF takes the position that federal grants and awards are a subset of the broader category of federal contracts and that in the context of grants, the terms are interchangeable. CRS argues that contracts and grants are distinct entities. Contracts are limited to civilian and military personnel employment and traditional procurement contexts, whereas grants involve less supervised dispersals of government largess without a well-defined quid pro quo. The statute is at best ambiguous, and each side of the debate can cite ample legislative history to support its view. Ultimately, the matter will have to be resolved definitively by a court, or Congress will have to resolve it with new legislation.

All of the granting agencies studied for this report close peer review committee meetings during the discussion and ranking of applications.[492] As we have seen, despite the *Washington Research Project* holding that pink sheets need not be disclosed to the *public*, NIH routinely makes these staff-prepared summaries of the comments of peer reviewers available to *applicants*, and if pressed it will provide rejected applicants with redacted copies of study section minutes. Although NSF originally failed to provide reasons to applicants, its recent procedural changes should ensure that most applicants learn the reasons for the reviewers' recommendations. EPA provides summary statements to rejected applicants, and they are theoretically entitled to see the written comments of the primary reviewers, but because these are discarded as soon as the summary statements are drafted, applicants do not as a practical matter have access to them. The practice in NEA varies. Some Program Specialists are willing to describe in detail the considerations that motivated the panelists; others only send out a form letter containing the applicant's score.

As we observed in Part 6, a reasons requirement is a powerful legitimator of a decisionmaking process, and it usually is relatively cost-free, because the system itself usually generates written statements of reasons, albeit sometimes in rather primitive form, for its own internal purposes. Granting agencies that rely upon the peer review model should go beyond the minimum requirements of FACA and the Privacy Act to adopt NIH's practice of preparing detailed one-page summary statements of panel evaluations on a routine basis, whether or not an applicant requests that information. Although this requires some additional staff time, it should not be excessively burdensome. Some documentation of panel deliberations is no doubt undertaken in any event. Reducing those notes to a one-page explanation should not add greatly to the staff time already devoted to the process. In addition, granting agencies should make any written evaluations prepared by the peer reviewers and minutes of any peer review panel meetings available to applicants as requested.

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[490] Memorandum to House Government Operations Subcommittee on Information, Justice and Agriculture from American Law Division, Congressional Research Service, dated January 4, 1990.

[491] Memorandum to Erich Bloch, Director from Lawrence Rudolph (undated).

[492] *See also* United States General Accounting Office, Peer Review: Compliance With the Privacy Act and Federal Advisory Committee Act 6 (1991).

Although not explicitly required by the Privacy Act, agencies could record and prepare transcripts of advisory committee meetings and make redacted versions of them available to applicants. Many granting agencies, however, administer dozens of peer review committees, and are hard-pressed merely to prepare minutes of panel meetings. A requirement that meetings be recorded and transcripts prepared would probably discourage candor to some extent and would definitely add greatly to the expense of the peer review process. On the other hand, some agencies, like NEA, for reasons of their own, routinely record peer review meetings. To the extent that transcripts are also prepared, they should be made available to applicants with information allowing the identification of particular speakers suitably redacted. The tape recordings themselves, however, should not be made available to applicants, because they would no doubt allow an applicant to attribute particular comments to particular individuals.[493]

2. Rebuttal

As we have seen, the Privacy Act gives persons about whom an agency keeps records the right to demand that the agency correct any information in such records that is not accurate, relevant, complete or timely. Depending upon the timing of the attempted correction, this provision could provide an avenue for applicants to submit rebuttals to inaccurate statements in the documents that the agency makes available as feedback. Agency practice with respect to providing rejected applicants an opportunity to rebut initial peer review determinations varies widely.[494] Applicants for NIH grants may submit purely factual rebuttals to the relevant Advisory Council, but it is highly unlikely than an Advisory Council will ever seriously consider a rebuttal absent flagrant factual errors. NSF's recent reforms do not provide any opportunity for an applicant to rebut factual errors in the review documents. EPA's Privacy Act regulations give applicants an opportunity to submit corrections to documents contained in their files, but the most important documents are usually removed before the applicant can gain practical access to them, and it is not clear that any submitted rebuttal would be considered prior to the final funding decision. NEA applicants can obtain a reconsideration of rejected applications, but only if an agency staffer is willing to take up the applicant's cause. Even in those rare cases in which an applicant can persuade a staffer to appeal, the grounds for reconsideration are very narrow.

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[493] *See* text accompanying notes 501-509, *infra*.

[494] According to Rustrum Roy, the Dutch government allows rebuttal prior to funding. Roy, *supra* note 404, at 327.

Of the agencies studied here, only NIH provides an opportunity for the applicant to rebut any errors manifested in the evaluations prior to the final funding decision, and even that process is not especially effective. The Privacy Act provides that a person about whom an agency keeps records has the right to review those records and to secure the correction of any information that is not accurate, relevant, complete or timely. Once again, however, this requirement applies only to records that the agency retains long enough to be available to a requesting applicant. Documents that are discarded at the end of peer review committee meetings or soon thereafter are generally not available to be rebutted under the Privacy Act.

The granting agencies should follow NIH's practice of making summary statements ("pink sheets") available to applicants sufficiently in advance of a final decision to correct inaccuracies and to have those corrections considered by the agency staff.[495] In addition, the agencies should retain any written evaluations of peer reviewers and minutes and any transcripts of committee meetings in the applicants' files for a sufficient length of time (normally less than one month) that the applicant can obtain a copy and rebut information contained therein. While this may increase the number of document requests and attempted rebuttals from the current minimal level, it should not bog down the process, because only factual rebuttals (not disputes about the merits of the evaluations) need be considered. Finally, the existing NIH process could be improved by allowing applicants to submit written rebuttals to the peer reviewers themselves, rather than to a reviewing entity (like the NIH Advisory Councils) that usually approve the peer reviewers' recommendations on a *pro forma* basis. This would provide a realistic opportunity to affect the decisionmaking outcome without consuming too much reviewer time.[496] A second meeting of the reviewers would not be required, except in cases in which the reviewers believed that a serious error had been made that would affect the outcome of the process. Any additional meeting could probably be accomplished by conference telephone call.[497]

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[495] *See* Chubin & Hackett, *supra* note 3, at 203-04 ("Principal investigators...should be allowed to write a rejoinder to their reviews before the award....").

[496] A recent book on peer review by Chubin and Hackett suggests that NSF implement a less adversarial "dialogue" model:

> Principal investigators and authors should be allowed to write a rejoinder to their reviews before the award or publication decision.... We hope peer review can become a dialogue, a collective decision with somewhat less of the adversarial tone it now has.

Chubin & Hackett, *supra* note 3, at 203.

[497] Because the conference call meeting would be a meeting of an Advisory Committee, it would have to be announced in advance. Because it would be considering an individual application, however, the

Recommendation

Granting agencies should prepare and routinely make available to applicants brief summaries of the reasons for peer review evaluations. If peer reviewers or peer review committees prepare written evaluations of individual applications, these documents should be retained for a full funding cycle, and copies of such written evaluations should be made available to applicants upon request in a redacted form so that particular evaluations may not be attributed to particular reviewers. This information should be made available to applicants sufficiently far in advance of the agency's final decision that applicants may review the documents, submit corrections of any information that is not accurate, relevant, complete or timely, and have those corrections considered by the peer reviewers and/or the agency staff.

Much of the reason for the wide variation among the granting agencies with respect to feedback and rebuttal stems from the fact that few have attempted to articulate substantive criteria and guidelines for implementing their Freedom of Information Act, Federal Advisory Committee Act and Privacy Act obligations. In some agencies (e.g., NEA), the agency's practice varies from program to program depending upon the particular Director's attitudes about the value of sharing information concerning the content of panel meetings with rejected applicants. Such wide variations across programs within a single agency on issues as basic as the agency's Privacy Act obligations are difficult to justify. On the other hand, it is not necessary that the agencies narrowly confine the information that they make available to rejected applicants to the bare minimal required by the Privacy Act.

The agencies should determine in advance and in some detail the kinds of information that will normally be made available to rejected applicants and to the public and adhere to those determinations in all of the agency's programs in the absence of compelling reasons for departing from them. The best vehicle for crafting agency policy on information disclosure is an informal rulemaking proceeding devoted to that purpose. The agency could publish a proposed rule containing a detailed description of the information that will normally be available to applicants and to the public and specifying procedural vehicles for obtaining that information. Some information (e.g., scores, anonymous evaluations or staff summaries of peer evaluations) could be made available automatically in the agency's letter notifying applicants of the outcome; other information might be made available only upon receipt of a specific request and

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meeting could be closed to the applicant and the public. Thus, the meeting could be accomplished by a conference call in which only members of the peer review committee would be invited to attend.

only to someone authorized to receive it. The agency could even create an appeals process under which an applicant or member of the public could demand more information upon a showing of good cause.

Recommendation

Granting agencies should, through notice-and-comment rulemaking, write uniform procedures identifying information that will normally be made available to grant applicants and the public and specifying the procedures under which particular kinds of information will be available to different classes of requestors. Such procedures should specify information in as much detail as possible, and they should be made applicable to all granting programs within a single agency.

E. Anonymity

1. Applicant Anonymity

An obvious first-level shield against favoritism and animus is a requirement that the name and institutional home of the applicant be kept secret from the peer reviewers.[498] Like "blind grading," this sort of anonymity makes it difficult to reward friends or damage enemies, because the evaluator is not supposed to know which projects are associated with which applicants. It also should eliminate the "halo effect" that results in unmeritorious applications receiving funds on the basis of the reputation of the principal investigator. Finally, blind evaluations may increase the chances that meritorious applications from mavericks will be funded.

The most powerful objection to applicant anonymity is the fact that in many cases the best indication of the potential for success is the applicant's experience and past track record. Since peer reviewers cannot evaluate an anonymous applicant's track record, they would be limited to the application itself, which may depend more on the applicant's writing ability than his or her competence or potential for creativity. In relatively narrow fields, it is impossible as a practical matter to shield the identities of applicants from reviewers. People in a given field know each other's work, and the citations list for a grant application is likely to be filled with citations to the applicant's previous work.[499] Finally, blind reviewing may discourage competent reviewers from participating in the process.[500]

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[498] The following analysis addresses only the extent to which government-retained peer reviewers should be aware of the identity of applicants. It does not address the broader question whether the identities of applicants should be made available to the general public, a question that invokes the interplay between the Privacy Act and FOIA.

[499] *See* Chubin, *supra* note 425.

Applicant anonymity is desirable when it is feasible, but it is not often feasible. Some of the programs in NEA are able to achieve anonymity for portions of the review (e.g., blind auditions of orchestras or performers via tape recordings), but they lift the veil of anonymity for other portions.

Recommendation

Where feasible and consistent with effective application of merit review criteria, the identities of applicants for discretionary grants should not be revealed to peer reviewers. Agencies should consider allowing peer reviewers to conduct discrete portions of peer reviews under conditions of applicant anonymity in cases in which complete applicant anonymity is not feasible or consistent with effective application of merit review criteria.

2. Reviewer Anonymity

Many observers of the peer review process have suggested that the identity of peer reviewers ought to be a matter of public record. Biased reviewers can hide behind the cloak of anonymity and thereby avoid accountability to applicants and the general public for their biased evaluations. Opening peer review to public inspection could shield the decisionmaking process against unfounded charges of bias.[501] Some observers argue that reviewers who make career-shaping decisions about the scientific quality or artistic excellence of grant proposals should be willing to defend their evaluations forthrightly to those whose lives are directly affected.[502] Long-time observers of the peer review process, Chubin and Hackett maintain that:

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[500] 1976 House Hearing Reports, *supra* note 3, at 35.

[501] For example, peer review panels that make funding recommendations to the California Arts Council have public observers. According to Mr. Elliot Klein, Administrator of the Music Panel, "the fact that we have public observers at our meetings also furthers assures the level of integrity." Chris Pasles and Herman Wong, *Arts Council Doling Out Funds Today*, L.A. Times, Aug. 28, 1987, pt. 6, p. 1, col. 2.

[502] Opponents of reviewer anonymity at the 1976 House subcommittee hearings on peer review at NSF relied upon the following somewhat defensive arguments:

(1) Qualified reviewers can be relied upon to be candid and straightforward in their evaluation of a proposal, regardless of whether the system is open or closed. Reviewers who are not willing to defend their positions in an open system ought not to be reviewing Federal grant proposals in any case.

(2) Openness would result in more responsible and objective reviews. Superficial or personality-based comments would diminish, and the result would be a more focused and effective evaluation.

(3) Qualified scientists will continue to participate in the interest of furthering the best quality science.

> At bottom this suggestion [for eliminating reviewer anonymity] is motivated by two questions: Is it appropriate to allow comments in a review that one would not write directly to the author? and How many essential, accurate, critical comments about a manuscript of proposal cannot be expressed in language that could be directly communicated to the author? Criticisms that must be anonymous probably should not be written, and it would be a very rare criticism that could not be phrased in civil language.[503]

Chubin further maintains that reviewer anonymity promotes hypocrisy in professional relationships:

> The dichotomy between the face-to-face civility that peers are expected to maintain and the behind-the-scenes savagery that peer review protects creates noticeable strains—and sometimes outright cleavages—in a research community. Peer review thus disarms and factionalizes while shielding strong personalities from any timely cross-examination. The public and private exchanges between researchers may differ significantly in style and tone.[504]

Most reviewers, however, strongly object to this suggestion.[505] One former NSF official with more than eight years of experience as a program officer found this proposal to be "hopelessly naive and destructive."[506] The primary disadvantage of eliminating reviewer anonymity is the impact that it would have on the candor of the evaluations.[507] In a world in which the roles of applicant and reviewer are frequently reversed, a reviewer may not be as candid in a negative

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(4) Confidentiality makes the system unnecessarily difficult to defend from charges of internal bias, old-boy practices, favoritism, or other criticisms. That is, an open system can better demonstrate its impartiality and effectiveness.

(5) An open system would increase the workload of program officers in some ways and reduce it in others. In any event, staffing levels can be adjusted to the new workload.

(6) Openness means change and change may cause some problems initially; but, in the long run, the system will recalibrate and stronger reviews will result. The new system will stand public scrutiny, and science will achieve a higher level of credibility.

1976 House Hearing Reports, *supra* note 3, at 44-45.

[503] Chubin & Hackett, *supra* note 3, at 205.

[504] Chubin, *supra* note 425.

[505] Only 27% of the respondents in a survey of NCI applicants preferred eliminating reviewer anonymity, while 61% opposed it and 12% were undecided. Chubin & Hackett, *supra* note 3, at 78.

[506] Comments of Mr. Garth Redfield, *supra* note 108.

[507] See, e.g., Voelker v. Federal Bureau of Investigation, 638 F. Supp. 571 (E.D. Mo. 1986) (stressing the need for confidentiality in outside evaluations for purposes of government employment); Mervin v. Bonfanti, 410 F.Supp. 1205 (D.D.C. 1976) (same).

evaluation of a project. Even if all reviewers could somehow be absolutely shielded from retaliation, few members of a professional community are anxious to incur the hostility of a colleague by making sharply critical evaluations, even when warranted. As with nonanonymous faculty evaluations of students in job or professional school applications, the reader of the nonanonymous evaluation must have a keen eye for the slightest indication that the writer is subtly damning the subject with faint praise. As much as we might wish it were otherwise, it is simple human nature not to speak candidly when the subject of the conversation is in the same room.[508]

If the anonymity of peer reviewers were lifted, there could be a dramatic increase in overt and subtle "lobbying" of peer review members over the phone, at lunch, and in other contexts in which a potential applicant had an opportunity to buttonhole a reviewer. Although lobbying in the political context is justified as an attempt to convey information to poorly informed decisionmakers, it is generally viewed by the public as conduct just short of bribery. In context of discretionary grants, the peer reviewers have a predefined source of information (the grant application) that is meant to constitute the exclusive decisionmaking "record" upon which the rankings are based. No additional information is necessary or desirable. Therefore, most agency staffers, reviewers and applicants view overt lobbying as highly inappropriate in the grants process. To the extent that eliminating the reviewers' shield of anonymity opens up the entire process to the specter of lobbying, it is highly undesirable.

All of the agencies studied in connection with this report refused to reveal to applicants the identities of professionals who conducted detailed reviews of individual proposals. While protecting the identities of primary and secondary panel reviewers, NIH does make available to applicants and the public the names of all of the members of the panel. Similarly, the identities of EPA panelists are ascertainable to applicants who go to the trouble of attending panel meetings.[509] The applicant may then attempt to guess the identities of his or her primary and secondary reviewers among the 10-15 members of the panel. As a practical matter, it would be difficult in any event to shield the identities of panel members from applicants, because "it is impossible to keep secret the names of members of a standing committee who travel to Washington several times annually."[510] Because a person who wants to ascertain the identities of panel members can probably do so with some effort, they should be easily available to everyone.

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[508] 1976 House Hearing Reports, *supra* note 3, at 45-46.

[509] NSF also makes its lists of potential reviewers available to the public. These lists are generally so long that it is impossible to guess the identities of individual reviewers. 1976 House Hearing Reports, *supra* note 3, at 46.

[510] *Id.*, at 46.

As we have seen, the FOIA does not require that the identities of reviewers be revealed, because they are protected by the internal deliberations exemption to that Act's disclosure requirement. Reviewer anonymity is more difficult to protect under the FACA, because the identities of panel members must be revealed when the committees are chartered and when they meet in open session. The identities of the applications that a particular panel considers, however, need not be made public if the committee is free to go into "executive session" to consider individual applications. Although peer review committees in all of the agencies studied here do in fact go into executive session to consider individual applications, it is only permissible if an open meeting would otherwise reveal information "of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy," a topic discussed above. Similarly, whether the Privacy Act allows agencies to shield the identities of reviewers from applicants (as opposed to the general public) depends upon whether the document revealing that information constitutes "investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for...federal *contracts*...," an exemption that was also discussed above.

The question of reviewer anonymity under the Privacy Act is utterly unresolved. One side of the debate argues that the contracts exemption from disclosure is equally applicable to grants; the other side argues that grant and contracts are clearly distinguishable. The best way to resolve this impasse is for Congress to amend the act to provide applicant access to all staff-prepared summaries, initial written reviews by peer reviewers, and minutes of peer review committee meetings. The identities of the reviewers, however, should be shielded from view.

Recommendation

Congress should amend the Privacy Act to clarify that discretionary grant applicants may have access to and submit proposed corrections to all staff-prepared summaries, initial written reviews by peer reviewers, and minutes of peer review committee meetings. The amendments should provide that granting agencies may refuse to disclose information that would allow an applicant to identify the names of the persons who conducted detailed individual reviews of his or her application. The identities of all members of any peer review panels should be made available to applicants and the public.

If reviewer anonymity is a desirable goal, then it should be preserved in fact as well as in principle. Reports of breaches of confidentiality abound, even in institutions like NEA and NIH that take confidentiality very seriously. The only effective sanction currently available is removal of the offender from the committee and perhaps barring the offender from future committees. Granting agencies should explore stronger sanctions. One NEA official suggested that panelists should be sent a strongly worded letter informing them of their Privacy Act obligations and of the penalties that may flow from breach of confidences. Another NIH staffer suggested that granting agencies be empowered to administer fines for breaches of confidentiality. Since granting agencies are not usually regulatory agencies and do not typically have the authority to invoke civil or criminal penalties, this solution might require statutory amendment. It would also require a procedure within the agency for finding facts and administering the fines. Still another strong sanction that is probably available under current law is to bar offending reviewers from receiving a grant from the granting agency for a period of time, depending on the seriousness of the breach. Because this penalty may be perceived as too harsh, however, agency staff may be reluctant to invoke it. Because no sanction seems clearly preferable to the others, agencies should determine the proper punishment for breaches of confidentiality on a case-by-case basis.

Another serious problem with breaches of confidentiality is the difficulty of detecting instances of serious breaches. Almost everyone associated with the system at NIH believes that it happens sometimes, but most agree that it is not ubiquitous. Unless someone associated with the program serendipitously overhears a reviewer breaching a confidence, the most likely source of information concerning breaches of confidentiality are the persons to whom the confidential information was conveyed. Granting agencies could make confidentiality a two-way street by making it inappropriate to *receive* confidential information about the contents of peer review meetings as well as to give it. The agencies could promulgate regulations providing that grantees could lose their grants (and perhaps future grants) if they receive confidential information and do not report the source of that information to the granting agency within a specified period of time. The regulations would function much like an honor code in a university in which students are prohibited from cheating and are obligated to report any instances of cheating that they observe.

F. Composition of Review Committees

Several possible hedges against bias in peer review address the question of who may review particular applications. These largely prophylactic measures are aimed at preventing situations in which bias might infect the process from arising, rather than revealing bias as it happens. In addition, they can help alleviate fears that too much decisionmaking power has been delegated from publicly accountable agency officials to unaccountable peer reviewers.

1. Limited Nonrenewable Terms

One way to prevent "old boy networks" from arising is to ensure that the membership of peer review committees changes relatively rapidly by providing that each member may only serve for a limited nonrenewable term. For example, most NEA panels are reappointed on an annual basis, and a panelist may only be reappointed for a maximum of three consecutive one-year terms. Forced turnover can help ensure that the committees do not become dominated by particular individuals with narrow viewpoints. It does not, however, guarantee that the committees will not be dominated by persons wedded to a particular paradigm. In most agencies the staff is responsible for choosing the committee membership.[511] If the staff "stacks the deck" with persons who know each other and who share similar ideas about the relevant issues, the effect on the outcome of the granting process will be fairly predictable. So long as there are plenty of persons with the same viewpoint available among the prospective panelists, rapid turnover is not a solution to staff bias.

2. Random Selection from a Qualified Reviewer Pool

The potential for "stacking the deck" could be reduced by requiring the staff to assemble a long list of qualified potential reviewers and selecting actual reviewers for particular proposals or groups of proposals through a random selection process. Although this might give potential applicants a greater degree of comfort that the process was functioning fairly, it would reduce "old boyism" only to the extent that the original pool was not limited to prominent old boys. Random selection of reviewers would prevent the staff from choosing the most knowledgeable reviewers to evaluate particular applications, and the process would present the additional burden of assembling and running a fair random selection process.[512]

3. Youngster Participation

Another solution to the "old boy network" problem and to any systematic reluctance of established peer reviewers to fund "youngsters" is to provide that a certain percentage of the membership must consist of relatively new researchers. In highly competitive programs with chronic funding shortages, the conservative bias of peer review operates to discriminate against relatively young researchers attempting to break into the field. Over time, these discouraged "youngsters" will either shift to other research fields or leave research altogether. In addition to spicing up committees with persons reflecting fresh viewpoints, increasing youngster participation would give younger applicants an opportunity to see the system at work from the inside and perhaps enhance their own chances of securing a grant in future competitions.

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[511] One exception is EPA, where the staff chooses the chairman of the peer review committee, and the chairman chooses the remaining members. The problem may be roughly the same if the staff can choose chairmen who will predictably choose adherents of a particular point of view.

[512] 1976 House Hearing Reports, *supra* note 3, at 36.

4. Lay Person Participation

Most granting agencies currently appoint only experts from a very narrowly defined pool of "peers" to peer review committees. Some observers of the peer review grants system have suggested that the definition of "peer" be broadened to include professionals from neighboring fields and even lay persons with no special knowledge about the subject matter. In this view, "[t]he scientific merit of a field can be judged better from the vantage point of the scientific fields in which it is embedded than from the point of view of the field itself."[513] This view has also been advanced in the fine arts, which are generally more accessible to persons without particular training and experience.[514]

The tendency to choose peers from a very narrow pool limits the number of available reviewers and, consequently, concentrates the workload on the shoulders of a relatively small number of experts. In addition, it exacerbates the tunnel vision problem and facilitates the formation of old-boy networks. It also provides the potential for research and even financial conflict of interest, because a narrowly drawn pool of peers will invariably include some potential competitors of most of the applicants. Finally, in very specialized fields, limiting panels to recognized professionals risks rendering the process unaccountable to the public that ultimately provides the funds.[515]

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[513] Alvin M. Weinberg, Criteria for Scientific Choice, 1 MINERVA 159-71 (1963), at 164-65 (Quoting Dr. John Von Neumann). *See also* Roy, *supra* note 439, at 24.

[514] The former director of New York City's public art program suggests that NEA panels be composed of 11 persons, eight of whom would be chosen from among ordinary people, such as teachers, construction workers, housewives, and physicians. He argues that:

> The panel's discussion of what art should be exhibited would give artists a sense of what the community will support and the community a feeling for what the artists are trying to do, eliminating conflicts such as the over the Mapplethorpe exhibit. Had this been done with him, some of the offensive photographs would have been excluded without damage to his artistry.

Moreover, the panels will eliminate the stranglehold on NEA grants that a small group of artists and their supporters now have. They will provide opportunities for grants to many artists throughout the United States who are now excluded from the NEA old-boy network. Furthermore, they will be effective in challenging the mediocrity of the art that is on the so-called 'cutting edge' today.

Donald Martin Reynolds, Fund Art for the Community's Sake, Newsday, Nov. 6, 1990, p. 45.

[515] For example, performance artist John Fleck candidly admits that urinating on the stage and simulating lovemaking to himself is art because professionals say it is.

> Why is it art? Because art professionals say it is...I've got a pile of reviews saying how wonderful I am. It isn't for everybody. Not everybody is going to understand it, but not everybody understands modern art.

Paula Span and Carla Hall, Rejected!, *supra* note 326.

One shield against these sources of bias would be to appoint one or more professionals from related fields and educated lay persons to all peer review committees.[516] Appointing lay persons to peer review panels should enhance the accountability of the funding agencies.[517] Each lay member of a peer review committee would sit as a representative of the taxpayers who have no direct stake either personally or professionally in the outcome of the process. This would also help avoid the tunnel vision problem and perhaps even enhance the chance of funding innovative mavericks. Finally, a requirement that lay persons and professionals from related fields serve on panels would probably hinder any staff efforts to "stack the deck" with adherents to particular scientific or artistic points of view, because their attitudes would be less easily ascertainable in advance.[518] Congress thought so highly of the concept of lay participation on peer review panels that it wrote into the 1990 amendments to NEA's statute a requirement that each NEA peer review panel "include representation of lay individuals who are knowledgeable about the arts but who are not engaged in the arts as a profession and are not members of either artists' organizations or arts organizations."[519]

Other than the inconvenience to the lay person, the primary objection to including lay persons on peer review committees is that they will lack the

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Professor Joseph Epstein attributes the problem to the intellectual weakness of some fields of artistic (and presumably scientific) endeavor: "[I]f the field is weak, the grants are going to be shaky, because the peers are from those fields and they're giving grants to people like themselves." Richard Bernstein, *The Endowment: A Reflective Defense*, N.Y. Times, Aug. 14, 1990, B1, col. 1.

[516] Former NEA Chairman, John Frohnmayer consistently advocated lay representation on NEA peer panels, but by "lay" he apparently meant persons highly educated in the arts who did not obtain their livelihood from their art. *See Barbara Gamarekian, Arts Nominee Speaks Out Against Helms Amendment*, N.Y. Times, Sept. 23, 1989, sec. 1, p. 9, col. 2.

Rustrum Roy suggests that peer review granting agencies have defined "peers" too narrowly and should expand the class of peer reviewers to include representatives from "a national cross-section of professionals, i.e. it should be mandated that on the average, if 80% of the PhDs in materials science work in industry or government, then 80% of the reviewers of publicly supported research must come from the groups." Roy, *supra* note 439, at 24, 25. The proposal here is to go beyond the universe of peers, even broadly defined, to include educated professionals and lay persons on peer review committees.

[517] Arlene Goldbard, Co-director of the Baltimore-based Neighborhood Arts Programs National Organizing Committee, suggests that: "It would be possible to design a system of cultural responsibility, where the decisions about what was worthy of support, by and large, were made locally by the people who have some contact with the work as it's produced, who know something about the community in which the work is to be distributed." *Can the Government Promote Creativity—Or Only Artists?* N.Y. Times, April 25, 1982, sec. 4, pg. 6, col. 1.

[518] This observation is more accurate in the sciences than in the arts. Sometimes lay persons have fairly well-defined views about artistic issues that are easily ascertained in advance. For example, it would be fairly easy for a staff concerned about outside criticism and congressional pressure to reduce the probability of funding erotic art by appointing a lay person to the relevant panel whose views on erotic art were well known. Lay persons generally have less well-defined ideas about highly esoteric scientific issues.

[519] 45 USC §959(c)(2).

expertise to evaluate proposals properly. A lay person without training in the relevant field, it is argued, cannot possibly understand the strengths and weaknesses of any given application, much less measure one against the other.[520] Some professionals in the arts similarly maintain that "knowledge, experience, talent, and interest make the opinions of experts more valuable than those of the lay person. When speaking of art, the silly cliché '...but I know what I like,' is an unacceptable excuse for prejudice and ignorance."[521]

There are several answers to this objection. First, it is incumbent upon applicants for public support to write proposals clearly enough that educated lay persons can understand them. Second, with the help of the other panelists, an intelligent and interested lay person should become sufficiently educated about the critical issues that are on the cutting edge of a field of research. Third, it is not critical that the lay person understand all of the intricacies and nuances in order to gain a sense for the integrity with which the other panelists are applying the broad criteria to individual proposals, and this may be a sufficient role for a lay person in highly technical fields. Fourth, lay representatives are currently being successfully used in many highly technical regulatory agency advisory committees, such as FDA drug review panels and EPA science advisory committees, despite their lack of technical expertise. Finally, just as war is too important to be left to the generals, these decisions are too important to be left entirely to highly educated professionals who may view the world from very narrow perspectives.[522] Perhaps the most important lesson of NEA's public policy fiascoes of the early 1990s is that public support can quickly vanish when funding decisions are left to a small group of people who define a field of scientific or artistic endeavor, articulate the criteria for excellence in that field, and deem themselves the exclusive arbiters of excellence in that field.[523]

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[520] At least two NIH staffers interviewed for this project argued that there should be no public members on peer review committees, arguing that lay participants hinder the quality of the scientific debate.

[521] Salzer, *supra* note 393 (Ms. Salzer is a Professor of Drama at San Diego State University).

[522] Professor Karen Mulcahy testified to the Independent Commission on the National Endowment for the Arts that: "The decision-making of a grant panel is not the same as that of a jury at a show at an art gallery. Artistic excellence should be important but not controlling. It's like saying war is too important a public policy to leave to the generals. To say public culture should be decided on by artists is like saying Pentagon policy should be turned over to defense contractors." Paracini, *supra* note 347.

[523] Referring to the "NEA Four," Professor Joseph Epstein, a member of the National Council on the Arts, explained that:

> [T]he people who gave those grants are people from the field of experimental theater and performance art who appreciate that sort of thing. That's part of the problem. In those fields where there are no real standards, except a vague feeling that, "gee, it works," or, "it clicks" there is nothing very concrete to go on. When you read the panel evaluations on these grants, you feel that they are intellectually very thin.

Bernstein, *supra* note 515. Refering to complaints about the provision in the 1990 amendments that required lay participation on NEA peer review panels, an editorial in the Chicago Tribune asked:

Expanding the participation of lay persons or of scientists from unrelated fields will be successful in reducing bias only to the extent that the "outsiders" play an active role in the deliberations. In large programs administering many grants, the panels must of necessity divide up the considerable burden of reviewing individual proposals. Typically, the task of detailed review is assigned to a subcommittee of one or two members of the committee who are especially familiar with the field of research addressed by the proposal. As a practical matter, other members of the panels are not likely to read the proposals in sufficient detail to offer cogent challenges to the evaluations of the original reviewers. Indeed, one frequent participant in peer review panel meetings in NIH observed that the agency staff puts pressure on panel members to accept the evaluations of the subcommittees by requiring that any panel members who question those evaluations must write up a justification for their objections. One easily implementable solution to this dilution of the voting strength of the outsiders is to require that every application be read in detail by both a scientist familiar with the field and a person who is not an expert in that particular scientific field.

5. Size of Committees

One way to shield against animus and against the sort of research conflict of interest in which a panel member attempts to downgrade proposals of competitors is to expand the size of the committees. The more that a panelist's "blackball" vote is diluted by other votes that are purely on the merits, the less effect that vote will have on the overall rankings. Thus, committees in NIH with more than 25 members and committees in EPA with up to 60 members experience very little blackballing. Indeed, short of a conspiracy, blackballing is virtually impossible in such large committees.

Large committees, however, are very expensive to assemble and maintain. Travel costs alone can be quite substantial for a very large committee, especially if it is required to meet as many as three times per year. Large committees can also be difficult to manage, and they are generally less efficient. Unless personal

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> "Could it be that the arts community is upset because it senses that it has lost the franchise on 'aesthetic authority'? For twenty-five years, the NEA's 'peer-review' system allowed the arts community to enclose an increasing ingrown notion of aesthetic authority. Not incidentally, it also has been able to divvy up the government kitty among its favorites, often in disregard of elementary principles of conflict-of-interest, public taste and, some cynics would say, artistic merit."

Editorial, Chicago Tribune, Dec. 4, 1990, p. 22. *See also* Margaret Spillane, *The Culture of Narcissism: Performance Artist Karen Finley and the National Endowment for the Arts*, THE NATION, Vol. 251, no. 20, pg. 737, Dec. 10, 1990 (complaining that the artists' "specialized class-bound notion of Those Who Know What Art Is—and those who get to make and judge that art—persistently undermines confidence in the popular creative spirit"); Knight and Slye, *supra* note 386.

animus on the part of panel members is a particularly pressing issue (e.g., a field dominated by two warring camps), the added expense of expanding the size of the committee may not be justified by the possibility that one panelist will deliberately downgrade a proposal so severely that it will not be funded. In highly competitive programs in which only a few very large grants are awarded, however, the additional expense of assembling large committees may be warranted.

6. Number of Committees

Another way to shield the peer review process from animus and favoritism is to conduct a multi-tier review in which more than a single committee has responsibility for evaluating each proposal. Many peer review granting agencies have a high-level advisory committee made up of very prominent people who look over the results of the original peer review committees and have the power to change the results (or recommend that the agency change the results). The Advisory Councils at NIH and the National Advisory Council on the Arts are two examples. This second tier review, however, is usually quite superficial and rarely delves into the merits of individual proposals. Although they have many important functions, high-level review panels do not have the capacity to ferret out and eliminate bias.

The multi-tier process in NSF's Science and Technology Research Centers Program offers a good model for programs that make a few large grants. In that process, a proposal is initially distributed to outside mail reviewers and then to a six-member peer review committee for the purpose of culling the applications down to a manageable group of 30 applications. Additional experts are assembled into site visit teams that visit the 30 sites and report back to still another "external peer review committee" that examines all of the information available on the 30 institutions in two separate groups. After each group reevaluates the results of the other group, the full external peer review committee identifies the 15 or so applications that it recommends for funding.

While this extremely thorough system effectively shields the decisionmaking process from animus and favoritism, it is exceedingly resource-intensive, and it would not generally be justified for programs that award a large number of small grants. The very last step, however, is relatively inexpensive, and might be useful even for very large programs. The prospect of having a second subcommittee examine the results of the first subcommittee's evaluations should caution panelists against attempting to blackball proposals by giving them very low scores.

Recommendation

Granting agencies should not limit the pool of available peers to narrow professional fields, but should instead attempt to appoint reviewers from related professional fields to peer review panels. Granting agencies should appoint at least one lay person without training in the relevant field to every peer review panel. Granting agencies should also attempt to include younger professionals who have not previously received grants. Granting agencies should provide that the membership of peer review panels changes on a regular basis. To the extent consistent with agency resources and depending on the size and number of the grants awarded in a program, granting agencies should consider maximizing the number of persons serving on an individual peer review committee, performing duplicate reviews in two or more subcommittees, or appointing multiple committees to perform a tiered review.

7. Conflict of Interest

The granting agencies are by-and-large sensitive to the problem of financial conflict of interest,[524] and they generally prohibit a reviewer from participating in the evaluation of his or her own proposal or a proposal from his or her own institution.[525] NIH and NSF regulations allow a person to sit on a panel that reviews an application from that person's own institution,[526] but require that person to be absent from the discussions of the institution's application. A virtually identical provision in NEA's regulations was severely criticized on the ground that the conflict still existed even though the affected panelist was absent.[527] As was the case with NEA, there should be a sufficient number of qualified reviewers available to evaluate a panel's applications without drawing on persons from institutions with applications pending before that panel.[528]

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[524] The prototype recusal requirements are those of NIH, which exclude from study sections applicants, family of applicants and their co-workers both at their institutions and at other institutions. In addition, a panelist must leave the meeting when the panel is considering an application from his or her own organization or an organization with which he is negotiating for future employment.

[525] The existing conflict of interest guidelines only obliquely address applicants who are former students of panelists, a phenomenon that occurs with some frequency in the sciences, though perhaps with less frequency in the arts. EPA has a rough rule of thumb that a panelist need not recuse himself from the consideration of proposals from former undergraduate students or from former graduate students who have not graduated within the last five years. This seems like a reasonable approach to reducing the appearance of favoritism toward proteges. The problem is not sufficiently widespread or disturbing, however, that the rule of thumb should be written into a binding regulation. Peer reviewer should be asked at the outset of the process to identify any former students among the applicants, and they should be asked to recuse themselves in accordance with the five-year rule of thumb.

[526] Since NSF reviewers meet as panels much less frequently than NIH reviewers, this issue does not arise in NSF as often as it does in NIH. The problem does arise, however, in the Science and Technology Centers Program and is dealt with by dividing the large panel of 30 or so panelists into two groups and ensuring that no panelist sits in the group that performs the first review of the applications from that panelist's institution. *See* Part 3.

[527] *See* Part 5, at notes 84-84.

The agencies have generally failed to pay sufficient attention to the problem of research conflict of interest. The conflict of interest regulations of only one of the agencies studied in this report addressed the possibility that a reviewer could use his or her position to decrease the probability of success of applications from competing scientists.[529] And only one agency dealt with the possibility that reviewers might use information gleaned from the peer review process to their own financial or research advantage. Some agency officials opined that, like plagiarism, research conflict of interest would be classified as scientific misconduct and therefore subject to sanctions such as removal from peer review committees or debarment from the grant process.

The research conflict of interest problem can best be addressed through amendments to agency conflict of interest regulations. The most effective solution is a complete bar on a reviewer's participation in the consideration of his own application or one from a close associate or the institution that employs him and to prevent him from evaluating any application of a rival or rival institution in a competition for a pool of funds for which he or his institution is competing. Considerable criticism in the press lead Congress to amend NEA's statute to adopt this solution, and it does not appear to have hampered the peer review process at that agency unduly.

This prophylactic solution is probably feasible for many scientific research funding programs. If scientists conducting unrelated research are qualified to evaluate proposals in the particular field and if they are willing to devote their time to evaluating research in fields not directly related to their own research interests, then a ban may be appropriate. In some programs, however, this constraint may unduly limit the supply of qualified and willing reviewers. For example, in NSF's Science and Technology Centers Program, where virtually every major research institution in the country either has or is applying for a grant, it is difficult to find qualified scientists for mail reviews who are not associated with a competing institution. Thus, it may not always be feasible to bar persons with potential research conflicts of interest from peer review committees, even though these are exactly the persons who can most effectively blackball rivals and expropriate novel ideas contained in research proposals.

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[528] This may require that some attention be paid to the definition of "same institution." For example, if the University of California, Penn State University, or the State Universities of New York could conceivably be viewed as a single institution this recommendation could be troublesome. A better starting point for a definition of "institution" would be a single campus of a single university.

[529] NIH's conflict of interest regulations suggest that a reviewer "should not participate in the review of an application from a scientist with whom the reviewer has had long-standing differences which could reasonably be viewed as affecting objectivity." NIH Manual 4510, *supra* note 51, at 7; NIH Manual 1805 at 6-7.

Alternatively, all members of peer review committees could be required to sign an oath that they will not use any information gleaned from the review process to further their own research interests. To some extent, the other members of the panel can police against research conflict of interest, because they may be familiar with each others' research and therefore know whether one of their number may inappropriately gain access to information about research in a competing laboratory. The problem with this solution is both the difficulty of proving that a researcher violated the oath and the chilling effect that the oath might have on reviewers. It may be that few researchers would be willing in advance to subject themselves to sanctions if a rejected scientist later accused them of appropriating research ideas.

Still another suggestion might be to promulgate a general rule prohibiting reviewers from using information and ideas gained in peer review committees in their own research absent the written consent of the applicant. Any applicant who believed that his ideas were appropriated could lodge a complaint with the funding agency. If, after a hearing, the claim were proved to be valid, the agency could suspend further funding of the offender's research or condition suspension on some more appropriate penalty, such as a public retraction and apology.

In the final analysis, the remedy for research conflict of interest is the professional integrity of the researchers who sit on the committees and the willingness of other scientists to look unfavorably upon the abuse of the peer review process to appropriate the ideas of others. The Director of an important NSF program observed:

> As to conflicts of research interests, this is something you really can't legislate. If you try to define it and write it down, people will use it as a crutch. Just like Keating in the S & L scandal - if you write down a rule, then people use it as a reason to get by and play games, saying you said this, but you didn't say this. They will play games with the interpretation of the rule. You just can't legislate morality.[530]

Yet there is currently no explicit prohibition of the practice and no remedy for the damage done by this abuse of the peer review process in the conflict of interest regulations of any of the agencies studied in this report. Indeed, it is even possible that some scientists view this access to the ideas of others as appropriate compensation for the time spent reviewing proposals.[531]

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[530] Telephone interview with Dr. Bill Harris, *supra* note 431.

[531] *See* Chubin & Hackett, *supra* note 3, at 205.

Recommendation

Granting agencies should promulgate conflict of interest regulations that prevent any person from reviewing or sitting on a panel that reviews his or her own grant application or the application of a close collaborator, a recently graduated former student, or an affiliated institution. The regulations should provide that when the agency asks a reviewer to review the application of a close competitor or competing institution, that fact must be disclosed to the agency, to other members of any peer review committee and to the applicant before the time to ask for reconsideration or appeal has expired. To the extent feasible, agencies should avoid asking a reviewer to evaluate the application of a close competitor or competing institution. If necessary, granting agencies may provide for specific waivers of the conflict of interest recommendations on a case-by-case basis where there is no other practical means for securing appropriate expert advice on a particular grant application.

8. Peremptory Challenges

One fairly inexpensive way to enhance the perception of fairness in the peer review process is to allow an applicant to nominate one or more researchers for exclusion from the list of peers available to evaluate his or her work. An applicant could be invited to submit a short list of persons that the applicant believes to be biased with respect to his or her research. The applicant might be required to provide reasons for exclusion or to choose from a list of reasons deemed appropriate by the agency. Appropriate reasons could, for example, include animus or financial or research conflict of interest. Lack of qualifications, however, should generally not be a sufficient reason for a peremptory challenge. The agency staff is in the best position to determine who is qualified to review an application.

Providing an applicant one or two peremptory challenges should help reassure rejected applicants that they were not blackballed for personal or idiosyncratic reasons. It may also increase the comfort level of applicants (especially in programs in which for-profit institutions are competing for funds) that their ideas will not be expropriated. We have seen that the staffs of NIH and NSF occasionally allow peremptory challenges on an informal basis, and this appears to add to the general perception that the programs are being run fairly.[532]

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[532] One question that might arise if peremptory challenges are allowed is whether potential peer reviewers could obtain such challenges under FOIA. The short answer to that question would seem to be that any written challenge would be available under FOIA, except to the extent that information contained therein fell within one of the Act's exemptions. Although this is not the place for an extended examination of this issue, such challenges would normally not contain trade secret information. Although clearly related to future deliberations, the request itself would probably not come within the exemption for internal

The primary disadvantage with peremptory challenges is that they deplete the supply of potential reviewers. In very narrow fields, the only qualified reviewers may be potential competitors or existing rivals. Many smaller programs have only a single peer review panel that is competent to review some proposals. In those programs, the peremptory challenge would result in the removal of the challenged individual from the deliberations. The potential contribution that the excluded individual may have on the panel's deliberations on other applications may outweigh the potential for bias with respect to the applicant making the peremptory challenge. For these reasons, the number of peremptory challenges allowed to any individual applicant must be limited.

Another objection to peremptory challenges is that in some fields, it may allow applicants "to influence the review of their proposals by challenging the most competent and incisive reviewers."[533] Although limiting the number of challenges would not eliminate such attempts to "game the system," the agency could discourage such strategies by requiring challengers to provide adequate reasons for their challenges as suggested above.

Recommendation

Granting agencies should by regulation provide that any applicant may submit a confidential list containing a small number of potential reviewers that the applicant deems objectionable together with a statement of the reasons for the challenges. The agencies should presumptively grant such challenges, unless the agency determines that a qualified group of peers cannot be assembled if all such challenges are honored. The agencies should provide, on a confidential basis, reasons for rejecting such challenges to the applicants who submit them.

9. Eliminating High and Low Scores

Most government funded programs involving discretionary grants have enough funds available to fund fewer than one-half of the applications submitted to them. In programs in which there is intense competition for limited funds, a single peer reviewer can affect the outcome at the margins by giving an application a very high or very low score. Panels with large numbers of members can borrow from the practice of athletic events involving qualitative evaluations (e.g., figure skating and diving) and eliminate the high and low scores from the calculations of the average score. Panels with more time to spend on discussing

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agency deliberations. Nor is it clear that disclosure of the information would constitute a "clearly unwarranted invasion of personal privacy." The person making a peremptory challenge has no obvious privacy interest in shielding that fact from the object of the challenge.

[533] Comments of Mr. Robert A. Papetti, *supra* note 204.

the merits of applications can have the agency staff identify "outliers" and request that the panel devote further attention to those applications in which one or more individual scores varied from the mean by more than a predetermined amount.

Recommendation

Peer review committees that rely upon qualitative scoring systems for evaluating and ranking discretionary grant proposals should develop vehicles for either eliminating or further discussing individual scores that vary widely from the average.

G. Lobbying Peer Reviewers and Staff

One of the most significant advantages of the peer review model is that it discourages lobbying and influence-peddling. The professionals and lay persons who participate in the peer review process understand that decisions should be based upon the information contained in the applications, and not upon information and arguments supplied *ex parte* by interested outsiders. The peer reviewed granting decision is supposed to be made objectively on the basis of the application and the reviewers' assessment of the qualifications of the applicant. With respect to *ex parte* contacts, the adjudicatory model seems entirely appropriate in the granting agencies that rely upon peer review.

Lobbying upper-level advisory committees and upper-level agency staff is an inappropriate technique for securing discretionary grants and therefore should be prohibited. At the very least all attempts to sway peer reviewers and agency staff outside the formal confines of proposal submittal and review should be noted in writing by the object of the importuning. Contact between lower-level agency staff (e.g., Program Directors in NIH) and applicants should be encouraged, but direct importuning of peer reviewers and upper-level staff with the power to accept or reject the recommendations of peer reviewers should not be allowed.

Recommendation

Granting agencies should encourage informal contacts between applicants and agency staff who do not participate in the decisionmaking process for the purpose of conveying information and providing advice. Agencies should adopt regulations subjecting ex parte contacts with peer reviewers and with agency staff in a decisionmaking capacity to the strictures of sections 554 and 557 of the Administrative Procedure Act.

H. Levels of Review

Several NIH officials interviewed for this report maintained that the Advisory Councils offered so little substantive input into the ultimate funding decisions that the Councils should be abolished. The primary complaint about Advisory Councils was that they did not offer any real scientific input. To some extent this was attributed to the presence of lay members on the Advisory Councils. One NCI staffer suggested that the Advisory Councils be replaced by the Boards of Scientific Advisors that already exist in each of the Divisions. In NSF lay persons generally do not sit on the peer review panels that are sometimes assembled to aid the agency staff, but the overall policymaking entity, the National Science Board, theoretically has the power to make the final determinations. This power is exercised frequently in the context of large programs like the Science and Technology Centers Program, but it is almost never used in the context of programs that make a large number of relatively small grants to individual researchers.

A very persuasive case can be made, however, for the proposition that funding decisions are too important to be left entirely to the scientists in the field in which the research is funded.[534] The funds, after all, come from the public purse, and the public can reasonably insist that funding decisions reflect criteria other than the scientists' view of scientific merit or the artists' view of artistic merit. Indeed, if important funding decisions were left entirely to persons who were not government officials, the process might raise constitutional concerns under the delegation doctrine.[535] In both the arts and the sciences, priority-setting invariably involves policy considerations that are intensely political in nature. While the agency staff is capable of incorporating externally articulated policy considerations at the final stage in which the ultimate funding decisions are made, the staff is also composed of highly trained professionals. In addition, lay participants can occasionally lend a perspective that enhances the quality of the scientific review.[536] An institutional vehicle incorporating lay members may be a necessary quid pro quo for continued funding of science on a large scale by government.

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[534] *See* text accompanying notes 513-523, *supra*.

[535] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[536] For example, the principal investigator in an ongoing NCI study involving women and breast cancer proposed to change the diet of 2,000 women for ten years. The proposal raised large policy issues appropriate for consideration by lay persons. The Advisory Council, however, recommended that the proposal be rejected on the largely scientific ground that the intense publicity about the link between cancer and diet would probably result in dietary changes in the control population that could render the results invalid. Telephone Interview with Leo Buscher, Grants Management Officer, National Cancer Institute. Thursday, Oct 4, 1990. This evaluation no doubt benefited from the lay perspective represented on the Advisory Council.

I. Rotating Agency Staff

In some of the agencies studied in connection with this report, the agency staffer responsible for a grant has a great deal of influence on the ultimate success or failure of the application, while in others his or her influence is marginal. For example, in NIH, the Scientific Review Administrator is supposed to be a silent observer of peer review meetings, speaking only when spoken to, and he or she plays only a limited role at Advisory Council meetings and in the upper-level decisionmaking process. The NSF Program Officer, on the other hand, is responsible for ranking the proposals and making the initial recommendations whether or not to fund, and the outside mail reviewers are in a sense merely advisors to the Program Officer. One former NSF peer reviewer, who is now a staffer responsible for grants in another agency, reported that it is not uncommon for the NSF Program Officer to suggest to the outside reviewers subtly how they might view the proposals. Many interviewees noted particularly the powerful position occupied by the NSF Program Officers. Agency staffers with biases of their own can distort the peer review process so that it does not result in funding the most scientifically meritorious proposals.

One relatively expensive solution to the problem of staff bias is to eliminate mail reviews or supplement them with panel meetings in all cases. For agencies with large numbers of applications and relatively low travel budgets, this may be impractical. A considerable advantage of mail review is the difference in price between a postage stamp and an airplane ticket. As valuable as unbiased peer review is to the process of awarding grants, monies spent on the process itself cannot be used on the research that the program is meant to support.

A much more easily implemented device for shielding the process from staff bias is to rotate the staff periodically to ensure that no single staffer establishes his or her own "barony" and thereby influences the course that research takes in an entire field. This solution has the disadvantage of depriving the system of the expertise that the staffer might acquire over the years in a single program, but that disadvantage might easily be outweighed by the advantage of interjecting fresh blood into the system. It would also have the indirect effect of enhancing the influence of the outside reviewers on the ultimate funding outcome.

Recommendation

Agencies that administer multiple programs for awarding discretionary grants should consider rotating staff periodically among the programs. Especially in programs in which peer reviewers do not meet to reach collective judgments, agencies should rotate the staff responsible for making initial funding recommendations.

J. Greater Role for Agency Staff

Perhaps the best shield against animus and favoritism is vigilance on the part of the agency staff serving the peer review committees. Staffers who attend peer review panel meetings can see the expressions on the faces of the reviewers as they make what may be sarcastic or ad hominum comments. The staff can also tell when a panelist has crossed the fine line between advocacy on the merits and favoritism for an "old boy" or hallowed researcher. Agency staffers are also generally more inclined to view mavericks with a sympathetic eye. If the staffer has the de facto power to discount votes that he or she believes are biased, the objectivity of the system is enhanced.

On the other hand, it may be expecting too much of a busy staffer to draw such fine lines. Most staffers have training in the subject matter that the panel addresses, not in psychology or politics. Empowering the staff to reverse or discount panelist votes may simply invite the staffer to second guess the experts on the merits or to express his or her own biases. Once the agency has decided to draft rules or guidelines on bias and conflict of interest, however, the staff can play a very important role in ensuring that peer reviewers are well-educated about them and that they strictly observe them.

K. The Audit Possibility

The openness in the peer review grants process inspired by the Privacy Act, the Freedom of Information Act and the Federal Advisory Committee Act should go a great distance toward insulating the process from animus and conflict of interest. Because it relies upon the policing activities of rejected applicants, however, the openness solution to the bias problem may lack efficacy in the context of a chronically underfunded program in which unsuccessful applicants who rock the boat are easily identified and shunned. In addition, openness by itself does not effectively address favoritism. Even in an open system, the victims of cronyism or the old boys' network are not likely to know that less meritorious proposals have been elevated over theirs for irrelevant reasons. Most rejected applicants will at most focus on the comments and review summaries that the agencies provide to them about their own applications. They are not likely to examine the entire proceedings to see if the process has been systematically or individually biased toward a particular person or methodological approach.

One well-known technique for spotting decisionmaking that is tainted with inappropriate or irrelevant considerations is the audit, under which outside auditors selectively examine individual decisions in considerable detail for evidence of bias or other impropriety. The audit idea surfaced during congressional hearings into alleged bias at NSF conducted during the mid-1970s.[537] Although an extensive report by the subcommittee recommended that NSF adopt an internal auditing program, little came of the recommendation for many years.[538] In 1989, NSF implemented a version of the audit idea with its "Committee of Visitors" program under which each Directorate must appoint a committee of outsiders every three years to review the peer review process in operation.[539]

It should be feasible to import the audit concept to scientific decisionmaking in granting agencies that use the peer review model. Agencies like NSF and NIH could either appoint or hire outside auditors to examine randomly selected files, including applications, written comments, telephone logs, conflict of interest statements, committee meeting audiotapes or transcripts. The auditors would probe the relationships between NSF staff and reviewers and between reviewers and applicants for financial and research conflict of interest. The audit would be strictly confidential; the names of reviewers and the contents of the reviews would not be made public. If the examination revealed evidence of bias or impropriety, the auditors could be empowered to interview participants and to write a report stating their conclusions about whether the process operated fairly and in accordance with agency regulations. In those, presumably quite rare, cases in which bias was detected, the agency could decide to investigate the matter more vigorously.

The audit idea has several advantages. First, it allows a motivated person or group of persons to conduct an intense review of a limited number of funding decisions without jeopardizing the critical confidentiality of the process. At the same time, the ever-present prospect of an audit should act as a substantial disincentive for reviewers and staff to bend the rules or to invoke improper considerations. If they were conducted by outsiders, the audits could also shield the agencies from charges of whitewashing by congresspersons and the general public. Over time, audits should provide useful evidence of the extent to which bias exists at various granting agencies.[540] If little evidence of bias resulted from a large number of audits, they could be eliminated.

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[537] 1976 House Hearing Reports, *supra* note 3.

[538] The subcommittee recommended that NSF conduct random audits of the decision processes in NSF for individual grants: These audits should be performed in sufficient detail to address questions of relations among Foundation staff members, applicants, and reviewers. Members of the auditing staff should not normally have responsibilities in the process of decisionmaking for individual awards. The audits will not replace any activities of the General Accounting Office or other Congressional arms. 1976 House Hearing Reports, *supra* note 3, at 58.

[539] *See* discussion in Part 3.

Audits have disadvantages as well. They will require resources that might otherwise be devoted to the pursuit of the agency's primary goals. A limited system of audits, however, should not be too expensive. The prospect of being audited might discourage qualified reviewers from voluntarily participating in the process. It is also possible that an overly zealous auditor will erroneously find bias in a process in which it did not exist, thereby disrupting the process for a time.

Despite its expense, it may be possible to implement the audit idea on an experimental basis. If it proved too expensive, it could be abandoned with little loss in time or energy. If it proved successful, it could inspire renewed confidence in the peer review process.

Recommendation

Granting agencies that rely upon peer review should experiment with random audits of the peer review process for bias and conflict of interest.

L. Conclusion

Despite its flaws, the peer review system is still the best model for making complex and exceedingly difficult decisions about how to allocate limited collective resources to the arts and sciences. One need only examine the output of NIH, NSF, EPA and NEA to conclude that the peer review model has produced marvelous results. The changes advocated here do not go to the heart of the peer review system. If they are not implemented, the peer review system will continue to function reasonably well. Yet there is little reason to remain satisfied with any flaws if they can be reduced or eliminated at little cost. With some modest improvements, the model that has evolved in this country should provide an example to the world of how a democracy can employ expertise in the service of artistic and scientific excellence.

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[540] 1976 House Hearing Reports, *supra* note 3.

Report for Recommendation 93-4

Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Legal and Political Accountability

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

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Introduction

The last three decades have witnessed a major shift in the preferred regulatory technique of American administrative agencies. As late as the presidency of John F. Kennedy the principal image of federal administrative action was the adjudication of a case—a prosecution by the Federal Trade Commission, an enforcement action by the National Labor Relations Board, a licensing proceeding before the Federal Communications or Federal Power Commissions or a rate proceeding at the Interstate Commerce Commission.[1] Thirty years later, when Americans think of "regulation" they tend to think of the adoption of general rules concerning workplace safety by the Occupational and Safety Health Administration, or of rules governing air or water quality by the Environmental Protection Agency.[2] Nor is rulemaking the exclusive province of post-New Frontier agencies designed with that regulatory technique prominently in mind. The politically salient activities of old line agencies—Federal Trade Commission regulation of charm school and funeral home practices or Federal Power Commission deregulation of natural gas pipeline prices—often feature rulemaking rather than adjudication.

This "paradigm shift" was in part evolutionary, but it also contained critical elements of conscious redesign of the administrative process. Regulatory reform movements in the 1960s emphasized rulemaking and extolled its virtues of efficiency, fairness and political accountability.[3] While Kenneth Culp Davis may have been more hyperbolic than most in characterizing rulemaking as "one of the greatest inventions of modern government,"[4] he was hardly alone in the belief that a shift from adjudication to rulemaking would reenergize federal policymaking, while simultaneously making it more rational and more democratic. Only through rulemaking could agencies hope to collect the necessary scientific basis for sensible regulatory policy and also permit the participation of the broad range of interests recognized to be affected by the modern regulatory state.

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[1] Thus when Judge Henry Friendly gave his influential Holmes lectures, H. Friendly, "The Federal Administrative Agencies: The Need for Better Definition of Standards" (1962), his title defined a problem to which his answer was a clearer enunciation of agency policy in the course of rendering adjudicatory decisions.

[2] Here again Judge Friendly provides an instructive example. Eleven years after his exhortation to agencies to annunciate standards in adjudication he reversed a decision of the National Labor Relations Board doing just that on the ground that the rulemaking process was a superior vehicle for policy development than it was an abuse of discretion for the Board to announce new policies via adjudication. Bell Aerospace Co. v. NLRB, 475 F.2d 485 (2nd Cir. 1973), reversed NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

[3] For a general description of this regulatory reform movement *see* J. Mashaw and D. Harfst, The Struggle For Auto Safety, 4-7 (1990) and authorities therein cited.

[4] K. Davis, Administrative Law Treatise, §6.15 (1st ed. Supp. 1970).

While it was recognized that rulemaking powers would enhance administrative authority by giving agency policies immediate, universal effect rather than limited application in a particular case, rulemaking was also thought to have important "rule of law" virtues. For universal application also produces equality before the law, constrains administrative discretion in future individual cases, and gives immediate and advanced guidance to regulated parties concerning the government's behavioral expectations. Moreover, because policy would be announced generally and in advance it would be possible to hold agencies accountable both politically and legally for their choices. Administrators would no longer be able to hide behind the complex and idiosyncratic "facts" of particular cases. They would be required to justify their exercise of rulemaking power by direct reference to their grants of statutory authority and to the general "legislative facts" that justified a particular exercise of policymaking discretion.

Today's reformers tend to view rulemaking by federal administrative agencies more as a problem than as a solution. From one perspective rulemaking is a problem precisely because it has been the instrument by which large, previously unregulated, sectors of the economy have been subjected to federal edict. For these critics, rulemaking is preeminently the means by which costly and overzealous federal regulatory regimes have been constructed.[5] Regulatory reform from this perspective lies precisely in reducing the reach of rulemaking authority and in making it subject to a realistic appraisal of the costs and benefits of governmental intervention.

From a different substantive or political perspective rulemaking is equally strenuously criticized as having failed to live up to its promise. Many of the health and safety regulatory targets set in statutes passed in the 1960s and 1970s have not been reached. The brave new agencies of that activist era may have imposed many costs on society, but they have made only halting progress toward the safer and healthier world that was then envisioned. Regulatory program after regulatory program is years, if not decades, behind in completing (sometimes addressing) its announced or statutorily mandated agenda. The older commissions that experimented with rulemaking in the 1960s and 1970s as a response to charges of inefficiency, unfairness and lack of accountability, have largely returned to their more familiar adjudicatory processes. The machinery of federal rulemaking is widely viewed as so creaky and accident prone that administrators will resort to almost any other technique to attempt to get their jobs done.[6]

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[5] Perhaps the most famous of these critiques was Murray Weidenbaum's estimate that the total yearly costs of federal regulation total more than $100 billion. Weidenbaum, *On Estimating Regulatory Costs*, 2 REGULATION 14 (May/June 1978). The estimate was hardly noncontroversial. *See* M. Green & N. Waitzman, BUSINESS WAR ON THE LAW 33-40 (1981) (explicitly detailing the empirical flaws of Weidenbaum's calculation).

Although to some (perhaps a large) degree these competing visions describe a dispute about policy or politics, a dispute in which the troubles with "rulemaking" or "the regulatory process" are really procedural placeholders for some substantive disagreement; there is also a sense in which the two sets of critics might perceive a common problem. While pro-regulation forces are constant in their calls for a more effective and timely rulemaking process, deregulators often have a similar interest.[7] The rulemaking processes of regulation are also the policy processes by which deregulation might be, sometimes must be, pursued. Thus pro-regulatory laments concerning the inability of the Occupational Safety and Health Administration to generate rules regulating the large number of toxic substances found in American workplaces might find a mirror image in deregulatory frustrations concerning OSHA's torpidity in revising statutorily mandated rules adopted 20 years ago and long recognized to be out of date if not just plain silly. EPA may have missed hundreds of deadlines in issuing rules to protect the environment, but a regulatory process that drives the Federal Energy Regulatory Commission to virtually abandon its initiatives to reintroduce market discipline in energy pricing is no friend of "deregulation" either. If policymaking by rule has become moribund or "ossified" as some have argued,[8] there is a need to reconsider the structure of agency rulemaking as a mechanism of governance, quite apart from that mechanism's substantive effects in particular instances. This paper seeks to address that general institutional question.

While for many the underlying theoretical assumptions of the following analysis will be relatively nonproblematic, it makes sense to state some of them at the outset. As the analysis proceeds, these assumptions may become increasingly controversial. The first assumption is that the rulemaking process in all administrative agencies is shaped by the interaction of the agency's internal and external environment. More controversially, the assumption is that the external environment is dominant.[9] The signals that an agency receives from its external, legal and institutional environment will ultimately cause the internal procedural and managerial environment of the agency to adapt in order for the agency to survive or to prosper. Although not stated in precisely this way the basic idea that American political and legal institutions can hold administrators "accountable" presupposes the efficacy of external controls.[10] This assumption has two subsidiary consequences for the sort of legal-reformist analysis that is pursued here: First, it suggests that redesign of the external legal and institutional environment can produce desirable shifts in rulemaking or regulatory behavior. Put slightly differently, this assumption defines the design or redesign of the external environment of rulemaking as the primary legal problem to be addressed. Second, while there is no claim that internal, or managerial, reform is irrelevant to rulemaking performance (far from it) it is assumed (and sometimes argued)[11] that "good management," while necessary to regulatory success, is insufficient in the face of sufficiently stringent external constraints.

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[6] *See, e.g.*, Scalia, *Back to Basics: Making Law Without Making Rules*, REGULATION, July/August 1981, at 25.

[7] *See* Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985).

[8] *See generally* McGarity, *Some Thoughts on "Deossifying" The Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

[9] For an extended argument to this effect, *see* generally J. Mashaw and D. Harfst, op. cit. *supra* note 3, especially 172-201.

A second major assumption is that all the participants in the regulatory or rulemaking process are boundedly rational and limitedly altruistic. These are modest and "realistic" assumptions, but they diverge from considerable segments of the political economy literature on bureaucratic, firm, and individual behavior. By "boundedly rational" I mean merely that individuals and institutions pursue interests or goals that are of value to them on the basis of available, but always partial, information. I assume that agents are doing the best they can to accomplish their objectives, "muddling through,"[12] Lindbloom's famous phrase, given the information that they can amass and their cognitive (or bureaucratic) capacities for processing it. That they are "limitedly altruistic" says something about the goals or interests that participants in the rulemaking process may define as their own. This analysis assumes that all participants have some capacity to pursue goals or values (1) that they would define as the interests of a collectivity that is broader than themselves and (2) that are not immediately congruent or compatible with their own individual or group interests. But it also assumes that individual, firm or bureau "self-interest" will play a role, often a crucial one, in shaping behavior.

These behavioral assumptions are of great importance when analyzing the current rulemaking process and when proposing reforms to mold that process for the future. They tell us that we are not here operating in a realm in which either explanatory or prescriptive theories will be perfect. Because agents are neither perfectly rational, nor relentlessly self-interested (or altruistic) we are unlikely to develop explanatory hypotheses about current behavior that fit all the cases or to prescribe a redesign of the legal and institutional environment of rulemaking that will cure all its perceived ills. Law reform is a messy, empiric business where the facts matter, but are often unknown, seldom uncontroversial, and sometimes unknowable. Hence, theory also matters, but it must be used with care.

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[10] This position is explicit in much social science literature. *See, e.g.*, W. MAGAT, A. KRUPNICK, & W. HARRINGTON, RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR, 49-50 (1986) and authorities cited therein. This assumption is also implicit in much legal literature about regulation and administrative law. *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (describing modern administrative law as devoted largely to the task of promoting and equalizing the participatory opportunities of outsiders); *see* also C. Schroeder and R. Lazarus, eds., *Symposium: Assessing the Environmental Protection Agency After Twenty Years: Law, Politics, and Economics*, 54 L. & CONTEMP. PROBS. (Autumn 1991).

[11] *See infra* at 398-402.

[12] Charles Lindbloom, *The Science of 'Muddling Through,'* 19 PUB. ADMIN. REV. 79 (1959).

Third, we shall assume throughout that the contemporary complaints about the rulemaking process identify a real problem. We will indulge the view that rulemaking is currently so difficult and time-consuming that agencies fail to accomplish missions (either of a regulatory or deregulatory sort) that are worth doing. This assumption is heroic, but necessary. Reliable information on the true costs and benefits of agency regulation or deregulation is usually unavailable. Many have firm views on the subject, but data is in short supply. Indeed, lack of "data" somewhat misstates the problem. Many of the costs and benefits of regulatory or deregulatory initiatives are not measurable in any conventional sense. What government does is defines who we are and influences what we want to be. Policymaking by rule is not just a process of instrumentally rational implementation of predetermined goals. Hence, that agencies seem incapable of accomplishing as much regulation or deregulation as they would like, have failed to accomplish the regulatory or deregulatory missions set for them by the Congress, or have failed to accomplish those missions within anything like the timeframes allotted for them in the governing legislation, will be taken as defining a "problem" for which a solution or solutions should be sought.

Fourth, we will begin by assuming that "the problem" with rulemaking in federal administrative law is one problem or cluster of problems common to many agencies, rather than many distinct problems that should be defined differently for different agencies. When combined with the first assumption this suggests that we are here looking for some thing or set of things in the external environment of agencies that inhibits their rulemaking performance. It is this generic problem or problems to which we are seeking a solution. Ultimately we will need to relax this assumption. It is made now only to simplify the analysis.

Finally, we will indulge the assumption that the problems and solutions that are of interest are not problems and solutions for which no institutional design remedies are available. In particular, we will assume that the problem with federal agency rulemaking is not fundamentally a problem of broad political sentiment or political sociology. In other words, we will assume that the answer to the question "what is the problem?" is not, "The political culture has turned against rulemaking", or "No one trusts government to do anything any more." There is surely something to the notion that the current political culture both expects and reinforces underperformance on the part of federal bureaucracies including their rulemaking efforts. And, this political sentiment translates into all sorts of actions—reduced fiscal support levels from the Congress; the scapegoating and demonizing of federal bureaucrats by politicians, the media, and ordinary citizens; adversarial styles of interaction by regulated or beneficiary interests, and so on—that certainly do not facilitate the rulemaking process. But, because these broader currents of political culture or sociology are not malleable in the short term, we will view them only as constraints on the efficacy or political viability of solutions, not as primary causes of the rulemaking malaise that should be addressed directly. In short, we will begin as if there were "a problem" that has an (imperfect) institutional design "solution."

A final introductory note on the ambition of this project: The task at hand is to open up ways of thinking about the rulemaking process that may lead to more specific proposals for reform. The topic is vast because it entails no less than an attempt to better understand how government can be made to function both effectively and acceptably in an administrative state dedicated to liberal democratic ideals. The analysis that follows first attempts to define "the problem" with agency rulemaking by building on the previous literature. The essay then seeks to broaden or refocus discussion in three ways. The first is to identify a set of "internal" and "external" reform strategies and their interconnections. Both internal-managerial and legal-institutional reforms almost certainly have their place in an overall strategy. But our knowledge of how each type of effort might affect the rulemaking process is quite rudimentary. The connections between the external environment of rulemaking and the internal environment subject to managerial controls suggests that internal reform, if it is to have significant rather than marginal effects, may depend on changes in external circumstances. On the other hand, internal reform efforts might well be vastly more productive in the short run than efforts to reform the external environment of administrative rulemaking.

The second conceptual reformulation is to bring some of the stylized analytic capacities of game theory to bear on the problem of agency rulemaking. Institutional arrangements create highly complex individual and organizational incentive structures. A little formal modeling—even if necessarily both abstract and oversimplified—may help us to see old problems in a slightly different, and hopefully a more productive way. The basic suggestion that emerges from this analysis is that the legal system currently provides opponents of policy changes via rulemaking with dysfunctionally powerful incentives to delay or derail the process.

Finally, the paper ends by sketching three rather different general approaches to reform of the politico-legal environment of administrative rulemaking. These sketches are left at a very high level of abstraction, but seek to provoke further thought and discussion at both macro and micro levels. Strangely enough, while all the approaches ask us to decide how deeply we are committed to the Weberian-Progressive vision of "rational democracy" through bureaucratic governance, each reform program could begin with a similar initiative—a reversal of the now conventional presumption that affected parties are entitled to preenforcement (or preimplementation) judicial review of agency rulemaking.

I. The Retreat From Rulemaking

A. The Case Study Literature

The National Highway Traffic Safety Administration. In The Struggle for Auto Safety (1990), Mashaw and Harfst provide extensive documentation of the progressive loss of rulemaking momentum at the National Highway Traffic Safety Administration. In their words:

> NHTSA's regulatory behavior can be described concisely. Established as a rulemaking agency to force the technology of automobile safety design, NHTSA indeed functioned in a predominantly rulemaking mode until about 1974. NHTSA's promulgated rules, however, has had extremely modest effects in forcing the development of innovative safety technology. The rules that have become operational have required already-developed technologies, many of which were in wide-spread, if not universal, use in the automobile industry at the time of the standards promulgation. Since the mid-1970s, NHTSA has instead concentrated on its statutory power to force the recall of motor vehicles that contain defects related to safety performance. It has retreated to the old, and from the reformist perspective, despised form of legal regulation—case-by-case adjudication—which requires little, if any technological sophistication and which has no known effects on vehicle safety.[13]

The authors find that this shift from rulemaking to recalls began long before the Reagan Administration's regulatory relief program specifically targeted specifically the automobile industry. Moreover, the decline in rulemaking effort is documented by a number of different indicators. Not only were the post-1974 numbers of newly proposed rules down dramatically, so were all rulemaking issuances. Even counting all minor technical amendments as "rulemaking" NHTSA's total rulemaking issuances in the Federal Register in its second decade were less than half of those in its first. NHTSA's retreat from rulemaking was further documented by data on the steady decline in the costs of compliance with NHTSA regulations and a dramatic decline in agency resources allocated to its rulemaking effort. The steep decline in NHTSA's rulemaking activity during the mid to late 1970s is particularly striking because the agency was then headed by a Ralph Nader associate, Joan Claybrook, who was (and is) a strong believer in automobile safety regulation.

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[13] J. Mashaw & D. Harfst, op. cit. *supra* note 3, at 10-11.

The Consumer Product Safety Commission. In a 1984 article entitled *Backdoor Rulemaking: A View from the CPSC*, Terrence Scanlon, then a member of the CPSC, described an agency that was "easing itself out of rulemaking, [and] learning to use its adjudicatory powers to achieve the same results."[14] Indeed the CPSC situation is even more dramatic than that at the National Highway Traffic Safety Administration. According to Scanlon, "The informal consensus in the agency is that rulemaking is dead; it simply takes too much effort. The CPSC has started only one substantive rulemaking since 1981, and it withdrew that one in favor of a voluntary standard."[15] Like NHTSA the CPSC remains active on the recall front. Unlike NHTSA, the CPSC has been able to use its recall authority to develop standards that are rather like an adjudicatory version of a rule. The Commission, for example, recalled all children's squeeze toys of a particular description in 1981 after learning that there was a serious hazard that children might choke on them. This general recall created a de facto standard in the children's toy industry. The CPSC retreat from rulemaking is confirmed by other commentators, although as we shall see, different analysts ascribe this retreat to different causes.[16]

The Occupational Safety and Health Administration. The glacial pace of OSHA rulemaking has been often and well-documented.[17] In the words of Shapiro and McGarity's 1989 article:

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[14] T. Scanlon and R. Rogowsky, *Backdoor Rulemaking: A View From the CPSC*, REGULATION, (July/August 1984) at 27.

[15] *Ibid.*

[16] *See* T. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 35 (1982).

[17] *See* John Mendeloff, *The Dilemma of Toxic Substance Regulation: How Overregulation Causes Underregulation at OSHA* (1988); S. Shapiro and T. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1 (1989); C. Schroeder and S. Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L. J. 1231 (1984).

> OSHA, in particular, has been a disappointment. During its 17-year history, the agency has completed only 24 substance-specific health regulations. Perhaps the best indication that this output falls below what its proponents expected is that OSHA has either no worker protection standards or inadequate standards for more than one half of the 110 chemicals used in work places that the National Cancer Institute regards as confirmed or suspected carcinogens."[18]

Unlike NHTSA or the CPSC none of the case study literature suggest that the Occupational Safety and Health Administration has either abandoned rulemaking or relaxed its rulemaking effort. Indeed, OSHA has attempted to cut through the morass of hazard-specific rules by engaging in "generic" rulemaking. This strategy has not, however, been very successful. Although OSHA was successful in adopting a generic rule providing workers with the results of medical exams and on workplace air monitoring, it was much less successful with more ambitious rules for generic chemical labeling and in establishing a set of general "cancer principles" that would facilitate the regulation of particular carcinogens.[19] While OSHA did manage to get a general cancer policy promulgated, after years of effort, its final form was one that provided little help in subsequent rulemaking proceedings seeking to regulate specific carcinogens.[20] More-over, after years of effort in setting generic exposures for 428 toxic substances, OSHA was recently sent back to the drawing board by the 11th Circuit Court of Appeals.[21]

Although OSHA has an adjudicatory technique similar to the one available to the CPSC and NHTSA, it is not clear from the existing literature whether the agency has sought to substitute the use of this technique for rulemaking. It is clear, however, that OSHA's prosecutions under the "general duty" clause of its statute increased during the 1970s.[22]

The Federal Energy Regulatory Commission. In *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crises of the 1990s*,[23] Richard Pierce provided an extremely pessimistic view of future rulemaking at FERC. In short, Pierce concluded that FERC is unlikely to attempt to muster the political and bureaucratic resources necessary to adopt several extremely urgent rules governing the structure of the electricity generating market. These policies were proposed in 1988, but have since languished. And, even if the rules are ultimately adopted, Pierce's view is that the delay will make them too late to save the economy from years of costly electricity shortage.

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[18] Shapiro and McGarity, supra note 17 at 2.

[19] *See generally* Mendeloff, supra note 17 at 126-129.

[20] *Id.* at 131-32.

[21] AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992).

[22] *See* B. Mintz, OSHA: HISTORY, LAW AND POLICY, 460 (1984).

[23] 42 ADMIN. L. REV. 7 (1991).

The FERC situation, while similar in predicted outcome, has some striking differences with those previously recounted at NHTSA, the CPSC and OSHA. FERC, in its prior incarnation, the Federal Power Commission, was traditionally an adjudicatory agency. Indeed, during its first 50 years it issued virtually no rules whatever. This was not because adjudication had been discovered to be an efficient policymaking technique. Rather, in Pierce's account, it was because adjudication was the path of least resistance. FERC/FPC's adjudicatory process was so slow that virtually all policy disputes became moot before they were put in a posture that made them ripe for agency action.[24] Hence, if FERC has a preference for adjudication over rulemaking it is not based on efficiency considerations.

A second major difference is that FERC's rulemaking initiatives have largely been concerned with deregulation rather than regulation. Its first foray into substantive rulemaking was in the natural gas area and was designed to undo a complex system of ceiling prices that it had created over the course of years of decisions in adjudicatory proceedings. According to Pierce:

> FERC had spent the prior twenty years using adjudicatory decisionmaking to establish a variety of ceiling prices applicable to natural gas producers under the Natural Gas Act (NGA). By the time FERC completed that tedious process, it realized that its methodology was seriously flawed and that the data it relied upon were so stale that the ceiling prices were far below the cost of finding and producing new gas supplies. By establishing ceiling prices below the marginal cost, FERC had created a massive shortage that was deepening rapidly in 1973. FERC responded with a notice of proposed rulemaking in which it proposed to use a much-improved methodology to establish a new national ceiling price. By using rulemaking procedures and statistical analysis of current cost data, FERC was able to quadruple the ceiling price applicable to "new gas" within two years.[25]

FERC was initially quite successful in adopting rules under the National Gas Policy Act of 1978, a further command from Congress to deregulate the natural gas market. FERC's rulemaking efforts, however, began to run into heavy weather in court. Indeed, in Pierce's view, the legal and political atmosphere has become so stormy that FERC cannot be counted upon to produce much needed deregulatory activity in the electrical energy generating field. In his words:

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[24] *Id.* at 4.

[25] *Id.* at 5.

> Even when a major change in regulatory policy is desperately needed, urged on an agency by the courts, welcomed by Congress and implemented in a manner that yields enormous improvements in the performance of a regulated market, FERC's experience has shown that an agency and its staff can be publicly labeled lawless and incompetent making such a change. By contrast, FERC's traditional pattern of behavior exposed it to much lower risks. By pretending to be a specialized court, "storing" policy issues by referring them to "nigh-interminable" adjudicatory hearings, and hiding policy issues under a mountain of idiosyncratic facts, FERC minimized its political risks.[26]

Since the time of Pierce's article FERC has not returned to rulemaking in the electricity industry, but instead is attempting to establish some generic policies through adjudication. It is unclear whether this hesitancy is a result of its experience on judicial review or the uncertainties generated by Congress' active consideration of major statutory changes in this area. A voluminous bill that significantly alters FERC's powers over the electricity industry was recently passed.[27] Meanwhile, the agency received some significant reinforcement of its policymaking authority in the natural gas field *in Mobil Oil Corp. v. United States*[28] and, it has taken new major rulemaking initiatives with respect to the gas industry.[29]

The Federal Trade Commission. Like FERC the Federal Trade Commission is historically an adjudicatory agency. Indeed, it long took the position that it had no substantive rulemaking powers other than those that had been granted in specific, limited jurisdiction statutes subsequent to the Federal Trade Commission Act.[30] Having come under sharp attack for regulatory lassitude by the unlikely partnership of Ralph Nader and the American Bar Association, the FTC moved in the 1960s to reenergize its regulatory program by flexing newly discovered rulemaking muscles. But, the heyday of rulemaking at the FTC was short lived. In "The Federal Trade Commission and Consumer Protection Policy: A Post

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[26] *Id.* at 8.

[27] Energy Policy Act, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

[28] 111 S.Ct. 615 (1991).

[29] *See* Order No. 636 (April 8, 1992).

[30] *See* discussion in *National Petroleum Refiners Assoc. v. Federal Trade Commission*, 482 F. 2d 672, cert. denied, 415 U.S. 951 (1974).

Mortem Examination,"[31] Barry Boyer describes the rise and fall of rulemaking at the FTC in the following terms:

> In 1975 Congress confirmed the FTC's power to issue binding rules backed by stiff penalties.... Armed with this new authority, the FTC launched an ambitious agenda of proposed rules designed to rule out abuses in consumer credit transactions, hearing aid and used-car sales, vocational school promotions, funeral arrangements, television advertising for children, and other fields as well. There were almost two dozen major rules in all. Within five years the Federal Trade Commission's consumer protection policymaking program had been reduced to ashes.[32]

Boyer's account of FTC rulemaking and its demise, like Pierce's account of the Federal Energy Regulatory Commission, emphasizes the political dimensions of rulemaking failure. However, unlike Pierce's analysis of judicial delegitimation of FERC's deregulatory initiatives, Boyer's story describes a much more complex process of political failure. We will return to these causal explanations in the next section.

The Environmental Protection Agency. Perhaps no agency's rulemaking efforts have been as much studied as those of the Environmental Protection Agency. Few who have examined the EPA's rulemaking history have been content with the agency's performance. Some commentators are concerned particularly with the EPA's form of regulation. They fault the agency for its inability to shift its focus from command and control techniques to the use of emissions and effluent charges and pollution permit trading devices. Two decades after a well-developed critical literature urged this change of direction on the agency, it has made only hesitant progress toward lowering the costs of its mandated anti-pollution standards by utilizing market-like devices.[33]

Other commentators fault the agency for sacrificing environmental and economic values simultaneously. In *Clean Coal/Dirty Air*,[34] Ackerman and Hassler provide a case study of the EPA's development of emission control regulations for sulfur dioxide emissions from power plants. In the authors' view that extended and complex regulatory proceeding managed to produce both dirtier air than was necessary at higher costs than need have been paid.

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[31] Published in Keith Hawkins and John Thomas, eds., MAKING REGULATORY POLICY, 93-132 (1989).

[32] *Id.* at 93-94.

[33] For a general discussion see E. Meidinger, "The Development of Emissions Trading in U.S. Air Pollution Regulation", in K. Hawkins and J. Thomas, eds., MAKING POLICY AND REGULATORY BUREAUCRACIES 153-194 (1989).

[34] Bruce A. Ackerman & William T. Hassler, CLEAN COAL/DIRTY AIR (1981).

Finally, environmentalist critics are quick to fault the agency for its torpidity in regulating enormous numbers of pollutants and polluting processes. Moreover, the agency seems to have chosen its targets badly. It has regulated large numbers of pollutants and processes that make modest contributions to environmental degradation while leaving other whole classes of contaminants uncontrolled. A recent special issue of *Law and Contemporary Problems*[35] might be described as a 374-page orgy of hand-wringing concerning EPA's rulemaking performance.

B. The Popularity of Non-Rule Rules

Rules and adjudications obviously do not exhaust the techniques by which administrators may make policy. Policy also appears in a host of other guises, as press releases, manual issuances, advice letters, enforcement guidelines, and the like. These techniques are hardly new. They have been in use by most agencies throughout their histories. They are part of the "informal" process that commentators have traditionally characterized as the "life blood" of administrative implementation.

Seasoned observers of the federal administrative scene, however, detect a contemporary tendency to overuse these informal techniques as ways of avoiding the laborious process of "informal rulemaking" under the Administrative Procedure Act. Professor Michael Asimow has been particularly prominent in documenting this trend for federal agencies generally,[36] at the Internal Revenue Service,[37] and in the California state system.[38] Professor Robert Anthony has also completed a recent major study for the Administrative Conference describing the attempts of federal administrative agencies to formulate and implement binding policy in non-rule forms.[39]

Although no study rigorously demonstrates a statistically significant shift by federal agencies from the issuance of legislative rules to the employment of other, less formal, policy documents, there is virtually no dissent in the literature from the view that these techniques are on the increase and are a response to the

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[35] *See* C. Schroeder and R. Lazarus, eds., supra note 10.

[36] Asimow, *Nonlegislative Rulemaking And Regulatory Reform*, 1985 DUKE L. J. 381.

[37] Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX. LAW. 343 (1991).

[38] Asimow, *California Underground Regulations*, 44 AD. L. REV. 43 (1992).

[39] For a preliminary report of these efforts, *see* R. Anthony, "*Well You Want the Permit Don't You:" Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 AD. L. REV. 31 (1992).

"ossification" of rulemaking.[40] Commentators are also generally critical of these practices. The avoidance of the rulemaking process forgoes many of the informational, participatory and accountability advantages that have been previously described as the major benefits of rulemaking.

C. Other Evidence

The tendency of agencies to avoid rulemaking also finds support in recent administrative law jurisprudence. Some of the most prominent administrative law cases on the Supreme Court's docket in recent years have involved claims concerning non-rule rules. *Bowen v. City of New York*,[41] for example, complained of a secret internal policy of the Social Security Administration concerning the evaluation of disability claims. The plaintiffs ultimately demonstrated that thousands of disability recipients had had their claims adjudicated pursuant to a policy that was apparently well-considered, repeatedly communicated and consistently followed—but never published.

A slightly different problem was presented in the now-famous *Lujan* case.[42] There plaintiffs complained of a "program" of reclassifying public lands, which was said to be illegal under the governing statutes. Indeed, its illegality lay precisely in the failure of the Department of the Interior to adopt general planning regulations that would govern the implementation of the reclassification process and to file an environmental impact statement that evaluated the environmental effects of the policy. In an opinion that seemed to rest alternately on standing and on ripeness grounds, the Supreme Court decided that the plaintiffs had not complained of any "act" that was subject to judicial review. In short, the very informality of the policy that the plaintiffs wished to attack rendered it immune from legal challenge.

Suits claiming that policies should have been issued as rules, or that rules that should have been issued have not been, are also an extremely prominent part of the administrative law business of the federal courts of appeal. Indeed, it is this substantial mass of litigation that provides much of the evidence in the Asimow and Anthony studies of non-rule rules. Once again, one cannot say that this litigation demonstrates a "retreat" from prior levels of rulemaking, but it does suggest widespread avoidance.

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[40] *See, e.g.*, McGarity, *Some Thoughts on "DeOssifying" the Rulemaking Process*, 41 DUKE L.J. 1385-1462 (1992) (describing EPA's struggle to keep its hazardous waste criteria current through what it calls its manual on "test methods for evaluating solid waste.").

[41] 476 U.S. 467 (1986).

[42] Lujan v. National Wildlife Fed., 110 S.Ct. 3177 (1990).

D. Evidentiary Difficulties and "Problem" Definition

The evidence of the decline of rulemaking in federal administrative agencies is not necessarily persuasive. Many have noted the sharp growth in regulation during the Bush administration as compared with the Reagan administration, at least as evidenced by the number of pages printed in the Federal Register.[43] And, the President seemed to recognize this trend in issuing his moratorium on federal regulation, while requesting agencies to review and reassess all their currently published rules.[44] These gross statistics will surely give some solace to those who distrust case study evidence and wonder whether anything can be learned about the underlying administrative process by looking at reported judicial decisions. Others may also wonder whether we know enough about the qualitative nature of the problem, even if a retreat from rulemaking has occurred. Are we looking at a problem of government paralysis in either regulation or deregulation, or, instead, are we observing only a shift in the form of regulatory or deregulatory activity?

There are, alas, no easy answers to these quite sensible queries. Nevertheless, I believe that serious skepticism about whether there is a rulemaking problem is misplaced. First, the gross data from the Federal Register are not interpretable. Over the period of the Bush administration, for example, the Congress had passed a number of new and amended statutes that increase the demand on agencies for both regulatory and deregulatory action. Hence, even if we took a number of pages in the Federal Register as an accurate proxy of rulemaking activity by federal administrative agencies, we would want to compare that activity level with the level of "demand for regulation" in legislation both prior to and during that particular time period. And, if we then went through every statute in the U.S. Code to attempt to determine whether regulatory or deregulatory "demand" (however operationalized) was going up or down during this period, there would be virtually no way of knowing, by simply looking at pages in the Federal Register, how great a percentage of this regulatory demand has been met by agency action. For, an increase in the number of pages in the Federal Register is consistent with a lower level of rulemaking as well as with a higher level. If agencies are finding rulemaking more difficult because of external constraints, they may be engaging in ever-more elaborate justifications for the rules that they publish. In short, what the Administrative Procedure Act laconically calls a "concise statement of basis and purpose" may be becoming an extended brief that seeks to anticipate objections from every quarter, both political and legal. If so, more pages is consistent with fewer rules.

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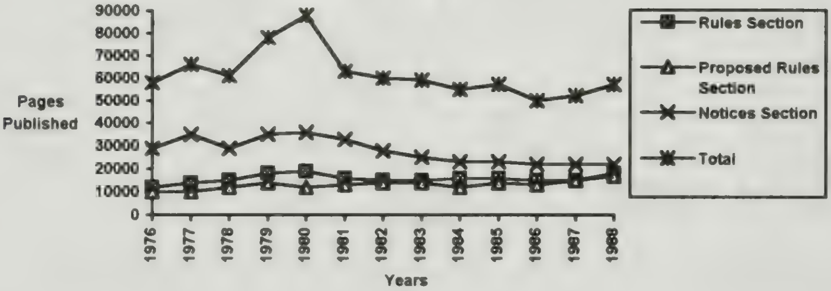
[43] On September 21, 1992, Robert D. Hershey, Jr. reported in the *New York Times* that while there were only 53,376 pages published in the Federal Register in 1988 before President Bush took office, by 1991 the total was 67,716, the third highest total for any year in U.S. history. "Regulations March on, Despite a Moratorium," page D1, cols. 1 and 2.

[44] Memorandum on Reducing the Burden of Government Regulation, 28 Weekly Comp. of Pres. Doc. 232 (Jan. 28, 1992).

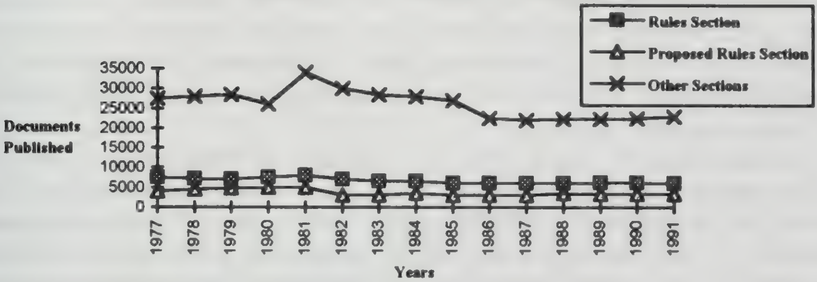
That numbers of pages filed in the Federal Register may not be a good indication of federal regulatory, particularly rulemaking, activity is suggested by Graphs 1 and 2.

Graph 1: Agency Filed Pages: Federal Register



First, Graph 1 reveals that while total numbers of pages published in the Federal Register were on the increase in the Carter years, dropped precipitously in the early Reagan presidency, and began to creep back up in the mid-1980s (with a sharp, sharp upturn in the next-to-last year of the Bush presidency), the changes in the number of pages of rules or proposed rules in the Federal Register have been much more modest. Indeed, looking at the page count, the Reagan administration managed to hold proposed and adopted rules only to about the levels of the Carter administration in the years 1977 and 1978. Moreover, the Bush administration reduced the number of proposed rules published in its first two years, realizing an upturn only in 1991. The notion that the Reagan administration dramatically reduced regulation or rulemaking only to see both turn up again sharply in the Bush administration is not borne out very strongly when the Federal Register page counts are disaggregated to take into account the different sorts of materials that are filed with the Office of the Federal Register.

Graph 2: Agency Filed Documents & Federal Register



Second, a look at Graph 2 reveals that when one takes into account documents rather than pages there has been a substantial decline in issued rules over the period 1976 through 1991. Only in 1979 and 1980 did the Carter administration get back to the level of rule publication in the final year of the Ford administration. And, from 1980 to the present there has been a steady decline in published rules combined with a similar, but somewhat lesser, decline in proposed rules.

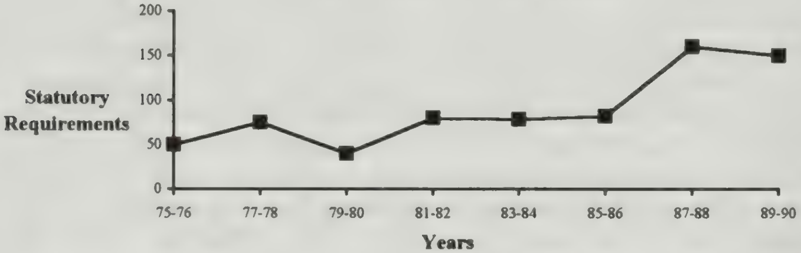
Constant or modestly increasing pages in the Federal Register rules sections combined with declining numbers of documents in those same sections lead to an obvious conclusion: the average length of documents filed with the Federal Register has been increasing from the mid-1970s until the present. Indeed, simple computation reveals that the average number of pages in the rules section of the Federal Register in 1991 as a percentage of that same average in 1975 is 218 percent. The parallel percentage for the proposed rules sections is 225 percent. Moreover, these changes were apparent in each administration. The growth in document size was 125 percent during the Carter administration: 159 percent over Reagan's two terms, and 130 percent over President Bush's first three years. These data lend some credence to the notion that we are seeing fewer rules that are published with more supporting data and explanation. But the argument that can be made here should not be overstated. These data are consistent with this hypothesis that something is making rulemaking harder, which is, in turn, reflected in the average length of rulemaking documents, but it is hardly substantial independent support for that hypothesis.

We should also like to note, of course, whether rulemaking by federal administrative agencies has been declining in the face of continued or increasing demands for rulemaking in either old or new statutory requirements for regulation or for deregulation. It is not easy to get persuasive data with respect to this question either. One might hypothesize that as statutes age the requirements for regulatory activity under them will decline. Statutes often have action-forcing provisions with respect to the immediate adoption of certain consensus or other standards combined with early time limits for the completion of specified regulatory activities that cannot simply be premised on preexisting standards. Hence, new statutes may induce a flurry of regulatory activity, which then naturally subsides. New ideas for regulatory improvement under old provisions are not necessarily infinite.

While plausible, this story is not necessarily persuasive. As conditions change agencies need to revisit their rules in order to amend and update them. Indeed, my in-depth study of NHTSA, with Harfst, suggests that a large inventory of rules is itself an impetus for further rulemaking. Petitions for recision, modification, waiver and the like were incessant at the National Highway Traffic Safety Administration during the period that we reviewed its rulemaking product. These activities probably demanded more staff time than did the development of new regulations. Hence, the "demand for rulemaking" may not atrophy over the life of a statute, even when Congress fails to revisit it.

But, Congress does revisit old, and pass new, statutes. The Federal Register office has been publishing a table of acts requiring publications in the Federal Register since 1936. Graph 3 plots the new requirements that appear in this table for each Congress beginning with the first year of the Carter administration (i.e., 1977).

Graph 3: Statutes or Statutory Sections Demanding Agency Publication in the Federal Register

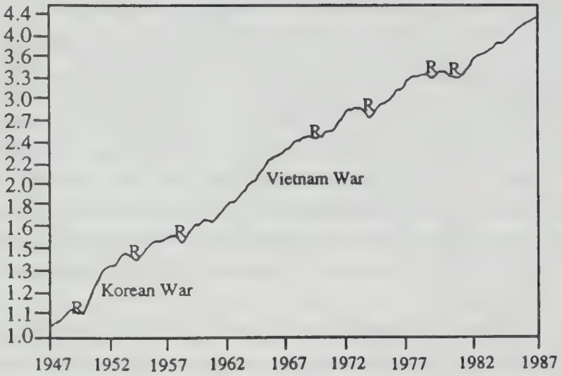


Beginning in the 1981-82 Congress numbers relate to discrete sections of the statutes at large requiring publication of some action in the Federal Register. Prior to that time reference is to whole statutes.

The number of new requirements in each Congress is substantial and the general trend line is up. These data certainly suggest that Congressional demands for regulatory activity are not abating. They are not, however, so easy to interpret. Counting statutes at large sections that require publication of something in the Federal Register may both overstate and understate new requirements for rulemaking. A single statutory section may require that multiple rules be issued. Hence, the number of statutory sections requiring publication in the Federal Register may understate the demand for rulemaking. On the other hand, demand for publication in the Federal Register is not necessarily a demand for the issuance of a rule. Hence, this count can overstate new requirements as well.[45] Nevertheless, other more indirect ways of getting at "regulatory" demand tell a confirmatory story. It is a virtual truism in the political science/political economy literature that demands on government increase as a function of both population size and wealth. Recessions aside, indeed included, GNP growth in the United States has been on a steep upward trajectory since the second World War.

While it is now popular to believe that the United States economy is stagnant and has been since the oil price shocks of the early 1970s, a glance at Graph 4 reveals that this is not the case.

Graph 4: GNP Growth, 1947 to 1989 (1982 dollars, billions, log scale)



SOURCE: *National Income and Product Accounts*, table 1.2; *Survey of Current Business*, July issue yearly, table 1.2.
R = Recession

Moreover, as Table 1 in the Appendix reveals, our population has grown by almost 25 percent in the two decades between 1970 and 1990. By contrast, federal civilian employees have grown by less than one hundred thousand persons during that period. The ratio of federal employees to population thus dropped from 14.4 employees per 1,000 population in 1970 to 12.2 federal civilian employees per 1,000 in 1990. In short, while the growth in national wealth and population is reflected in Congressional actions which increase the requirements for federal activity (at least as measured by the data in Graph 3), the Congress has not proportionately increased the size of the federal workforce available to respond to those new demands. Because we also know that over the same period, roughly 1970 through 1990, the procedural and analytic requirements for issuing rules have increased markedly, it would hardly be rash to conclude that the level of federal rulemaking in relation to "rulemaking demand," has been declining, perhaps precipitously.

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[45] It is possible to get a count of new requirements for regulations manually by paging through the statutes at large for each year and counting the new regulatory requirements. This is facilitated somewhat by the inclusion of the word "regulation" as a marginal note wherever a statute imposes a regulatory requirement. These marginal notes, however, are not in the electronic database at the National Archives and cannot be retrieved electronically. The magnitude of the manual task has deterred me from attempting it for the 16-year period under discussion.

In the hope of getting better data from a different source, I made a preliminary foray into the Unified Agenda of Federal Regulations. The results were sufficiently disappointing that I have not pursued the analysis on a more "scientific" basis. First, no clear pattern emerged. In some agencies activity levels are arguably going up while in others they are arguably going down. But the data are virtually impossible to interpret even within a particular agency. For one thing, the Regulatory Information Services Center changed the way rules were categorized in 1986 so that no clear comparison between Reagan's last term and the Bush presidency can be made. Moreover, whether activity is going up or down may depend on whether you are looking at pre-rule activity, proposed-rule activity, final-stage-rule activity or completed actions. And, cross agency comparisons are made virtually impossible by the different reporting approaches that have been taken. The Federal Aviation Administration, for example, seems to report all of its rulemaking activity along with its own indication of whether the rule is "significant." EPA, by contrast, does not report any rulemaking activity that it considers insignificant. EPA's criteria of significance are unclear, but they do not seem to be the same as those used by the FAA, and neither agency is using the "major rule" criteria of Executive Order 12,291 as a basis for its "significance" rankings.

Nor is it possible for the untutored eye to discern from the reporting in the Unified Agenda of Federal Regulations whether activity levels are primarily in a regulatory or deregulatory direction. The brief synopsis of the rule might well be enough for a sophisticated observer, who fully understands the regulatory status quo in a particular field to classify the rules with some degree of accuracy. When I looked at three agencies with whose regulatory activities I am not particularly familiar I found myself, in two of the three cases examined, unable to classify a majority of the rules as either regulatory or deregulatory.[46] I found this exercise both disheartening and encouraging. Disheartening because it obviously takes a specialist to interpret even the somewhat better data on rulemaking that is included in the Regulatory Agenda than in the Federal Register tallies. Hence any idea of doing some sort of quick and dirty random sample using the Unified Agenda as a database was lost. On the other hand the experience was heartening in the sense that it leant some support to the published case studies of agency rulemaking behavior. If it takes a specialist to interpret the data, perhaps we should believe what the case study literature is telling us.

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[46] For purposes of this experiment I looked at the unified regulatory agenda for 1992 and at the actions of the Federal Aviation Administration, the EPA under the Federal Insecticide, Fungicide and Rodenticide Act, and the activities of the Federal Energy Regulatory Commission. I would have classified twelve of EPA's entries as unclear, eight as regulatory and two as deregulatory. In the FERC context I would have classified eight of its listings as unclear, four as regulatory and three as deregulatory. Only with respect to the Federal Aviation Administration does regulatory or deregulatory dominate unclear in my categorization. Unclear accounted for 19 entries, 28 entries looked to me to be regulatory and five entries to be deregulatory.

The foregoing general data analysis may go some distance toward convincing us that the substantial case study and doctrinal evidence, portrayed in my earlier draft and suggesting a decline in federal agency rulemaking, describes both a real and a general phenomenon. It tells us little or nothing, however, about whether that decline is itself evidence of an "ossification" of regulatory or deregulatory policymaking or whether, instead, it reflects merely a shift from rulemaking to other techniques and instruments for the enunciation of policy. Can we say anything more about that issue? Something, but not a lot.

The suggestion that there is such a shift (evidenced by the prior discussion of the Anthony and Asimow studies and the doctrinal evidence) has received further support in Hamilton and Schroeder in this volume.[47] In brief, Hamilton and Schroeder stumbled upon a digest prepared by a private trade association that related EPA "guidance" documents to regulatory sections adopted and published as rules under the Resource Conservation and Recovery Act (RCRA). The ratio of guidance documents to published rules is quite striking. Counting every decimal point section in the Code of Federal Regulations as an independent rule, Hamilton and Schroeder find 697 "rules" under RCRA supplemented by approximately 19,000 pages of guidance documents. Unfortunately, there is no easy way to trace the evolution of EPA policy, or one should say policymaking technique, using this digest or index database. The index itself does not date the issuance of the guidance documents or "rules." It cannot, therefore, document a secular decline in EPA rulemaking under RCRA. While Hamilton and Schroeder make a plausible, but statistically weak, case for the proposition that EPA uses guidance documents where the costs of rulemaking are relatively high and the benefit of rulemaking over less formal policy enunciations relatively small, we cannot conclude anything definitive from their initial foray into this potentially fascinating database. They simply supplement the similar conclusions of students of other regulatory regimes.

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[47] James Hamilton & Christopher Schroeder, *Strategic Regulations and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste* (forthcoming L. & CONTEMP. PROBS. 1993). (By "formal" Hamilton and Schroeder mean promulgated through the §553 procedure; "informal" captures all other policy statements.).

Another straw in the wind is a recent (October 14, 1992) proposal by HUD to abandon its prior commitment to issue policies that are exempt from §553 of the APA through the §553 process. The proposal[48] is quite an interesting document. The agency explains quite candidly that it now believes that its regulatory process using §553 rulemaking "threatens to result in regulatory gridlock." HUD argues that its capacity to provide service and advice to the public will be improved dramatically by developing alternatives to notice-and-comment rulemaking and proposes "where legally permissible, to employ nonregulatory means of disseminating guidance concerning program operations." The Department's proposal is based upon a study of its regulatory process during the eight years in which it has maintained a computerized record of its rulemaking. HUD estimates that on average the §553 process costs it one year for every policy promulgated and concludes that this delay is without corresponding improvement in the quality of the policies developed.

It is clear from the HUD proposal that the Department has not fully determined how it will go about shifting from the §553 process to other policy processes. It declares itself willing, however, to experiment with a number of new ways for receiving public input and for disseminating information about agency policy. One such high-tech idea is the use of electronic "bulletin boards," which are generally accessible to HUD program participants.

Although I find the "circumstantial evidence" convincing, I conclude that if we want an airtight demonstration of a secular decline in rulemaking, and a persuasive analysis of whether this decline has resulted in inaction or a shift in regulatory or deregulatory technique, that question would have to be pursued in a series of agency case studies. Such studies are not easy. There is no unified agenda for manuals, guidelines, press releases, or enforcement actions, much less for actions not taken. Having made a serious inquiry into one agency to document its retreat from rulemaking and its shift in regulatory strategy to the use of recalls, I estimate the resources needed for that undertaking at roughly 1½ person years.[49] In short, the magnitude of the task of providing convincing scientific documentation leads me to think it sensible to resolve any lingering doubts in favor of a belief in the current conventional wisdom, that is, that rulemaking has, over the last 20 years, become more difficult and less utilized than the regulatory reformers of twenty years ago taught us to believe is desirable.

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[48] Fed. Reg. 47, 166 (October 14, 1992).

[49] *See* Mashaw and Harfst, op cit. supra 10-14. Agencies engage in different levels of record keeping and have internal impressions of their own activities that may or may not be borne out by the available data. Harfst and I, for example, found that NHTSA had no statistical data on its rulemaking output and that interviews with staff were quite unreliable. Agency staff responsible for rulemaking, for example, insisted that rulemaking activity was going up during periods in which we later determined that it demonstrably was going down. Hence, while a simple inquiry sent to certain "cooperative" agencies might tell us something, I would distrust it.

II. Comparing Causal Hypotheses

The literature that attempts to document a contemporary retreat from rulemaking by federal administrative agencies also discusses the reasons for that retreat. The identified causes of the under-utilization of rulemaking may be lumped generally into two groups: external and internal factors. "External factors" means simply the general institutional and political environment within which agencies attempt to carry out their policymaking tasks. Prominent among these external environmental factors are judicial review, executive oversight, and congressional-agency interaction. General public or constituency acceptance of the legitimacy of agency rulemaking is also put forward as an external constraining factor. The aspects of the internal environment most often discussed are the internal incentives and procedures for rulemaking within agencies and the structure and management of the agencies' rulemaking process.

These multiple causal hypotheses discussed below are not put forward, I hasten to add, as mutually exclusive reasons for the retreat from rulemaking. Agency unwillingness to go through the rulemaking process may be overdetermined. Each asserted "cause" may have been sufficient in itself, and all may be mutually reinforcing.

A. External Factors

Judicial Review. A number of commentators have identified judicial review as a major contributing factor to the abandonment of rulemaking by federal regulatory and other agencies. According to Mashaw and Harfst[50] NHTSA has seen several of its most important and innovative rules overturned by the courts and those decisions have had multiple impacts on the agency's rulemaking process. Losses in court because of uncertainties concerning the "practicability" of its rules has made the agency cautious about using any safety technologies that are not already "road-tested." This has been particularly debilitating for an agency whose statutory mission is to "force the technology" of automobile safety.

In addition, the courts' insistence on responsiveness to outside commentators has caused NHTSA to structure a highly iterative, and therefore time-consuming, rulemaking process. Delay, in turn, affects outcomes. Remands of certain crucial rules have altered the political timing of the agency's policy development. Rules that might have been successful at one period have become impossible to promulgate and implement as administrations and congressional personnel change. The willingness of the courts to second guess the agency has also reinforced the adversarial posture of parties who would be adversely affected either by the agency's rules or by its inaction or vacillation.

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[50] *Supra* at note 3.

The Mashaw and Harfst analysis is supported in part by other NHTSA observers.[51] And, complaints about judicial review are echoed by other commentators with reference to other agencies. Professor Pierce, for example, lays the blame for the Federal Energy Regulatory Commission's hesitancy to adopt needed deregulatory policies concerning the structure of electricity rates directly at the doorstep of the judiciary. Here again, the mechanism of effect is somewhat complicated. In Pierce's view the role of the courts has not been to stop FERC initiatives directly, but, by their lack of hospitality to other rulemaking actions, to demoralize and delegitimate the agency's policy processes.

Similarly, Professor McGarity describes judicial review as having had "a debilitating effect on the Federal Trade Commission's rulemaking efforts of the 1970s."[52] He recounts a series of early opinions evaluating the FTC's reenergized consumer protection efforts, which took a very dim view of the FTC's justifications for its rules, often finding that they lacked "substantial evidence" in the rulemaking record. McGarity notes further that during this same period the courts were routinely validating the FTC's traditional adjudicatory actions in much the same fashion that the courts ratified NHTSA's recall efforts.

While Professor Boyer, in his study of the FTC's rulemaking history does not give judicial review a major role in derailing the FTC's programs, his description demonstrates the uncertainty created by relatively uninformed judicial intervention. In his view "the courts reviewing trade regulation rules not only failed to create a strong incentive for high quality data and analysis; in some respects they seemed to reward poor empirical analysis."[53] Echoing Mashaw and Harfst's account of NHTSA, Boyer's analysis suggests that an informed observer of judicial actions at the FTC could not have predicted which rules would be reversed by the courts or even what issues the reviewing courts would find important.

Commentators have described judicial review as having had a very substantial adverse effect on the Environmental Protection Agency's rulemaking as well. Professor McGarity concludes that

> The fact that nearly all of EPA's first round technology-based standards resulted in remands on one or more technical issues, had a profound impact on the agency. Rather than respond to the remands, the agency in all but one case decided to give up, and it failed to promulgate national "best practicable

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[51] *See* S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 393 at note 93 (1986).

[52] McGarity, *supra* note 8 at 1413.

[53] Boyer, *supra* note 31 at 102.

> technology" standards for most of the industries for pollutants for which it had suffered a judicial remand.[54]

In a similar vein, Rosemary O'Leary concluded:

> From an agency-wide policy perspective, however, the impact of court decisions on the EPA is problematic. Compliance with court orders has become the agency's top priority, at times overtaking congressional mandates and threatening representative democracy. Clearly litigation is not the best way to formulate an environmental policy or to set our nation's environmental priorities.[55]

R. Shep Melnick's booklength study of judicial review of EPA air quality decisions suggests a more complicated but still, in his opinion, dysfunctional pattern of judicial review. While Melnick does not find judicial review to have directly frustrated EPA rulemaking efforts, he does find judicial actions often misinformed and constant sources of unintended side effects. While judicial review actually forced the agency in some cases to initiate or to speed up its rulemaking activity, the allocation of resources necessary to satisfy these judicial mandates has caused the agency to ignore other aspects of its environmental protection agenda—arguably areas of greater importance. In Melnick's view judicial review also warped the substance of agency air quality policy and often obscured the real issues. And, ironically, the federal district courts repeatedly refused to allow EPA to enforce the regulations that the courts of appeals had required that it promulgate. In the end Melnick observes:

> Taken as a whole, the consequences of court action under the Clean Air Act are neither random nor beneficial. . . Court action has encouraged legislators and administrators to establish goals without considering how they can be achieved, exacerbating the tendency of these institutions to promise far more than they can deliver. The policymaking system of which the federal courts are now an integral part has produced serious inefficiency and inequities, has made rational debate and conscious political choice difficult, and has added to frustration and cynicism among participants of all stripes.[56]

Yet the effects of judicial review on the EPA, and other agencies, is hardly noncontroversial. Professor E. Donald Elliott, recently General Counsel of the

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[54] McGarity, *supra* note 8 at 1417.

[55] O'Leary, *The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency*, 41 ADMIN. L. REV. 549 (1989).

[56] S. Melnick, Regulation and the Courts, 345 (1983).

Environmental Protection Agency, has said, "I would take issue with the assertion that we know that the effects of judicial review on the administrative process and on the internal deliberations within agencies are huge."[57] Elliott's skepticism is to some degree borne out by his study, with Peter Schuck, of the effects of the *Chevron* case and of remands by courts of appeals to federal administrative agencies.[58] Unfortunately rulemaking proceedings were a small portion of the sample of cases and remands that Schuck and Elliott reviewed. Hence, their study cannot provide a firm basis for general conclusions.[59]

Professor McGarity also finds that judicial review has had a serious negative effect on rulemaking at the Consumer Products Safety Commission. His argument is constructed primarily on the basis of *Gulf South Insulation v. Consumer Product Safety Commission*,[60] in which the court overturned the CPSC's ban on the use of urea formaldehyde insulation in residences and schools. That remand was particularly demoralizing for the agency because it viewed its database as more than usually comprehensive and sound. Nevertheless, the CPSC found itself second-guessed by the court of appeals on both the composition of its statistical sample and on the use of animal studies to demonstrate carcinogenicity.[61] McGarity notes that thereafter the CPSC went out of the rulemaking business with respect to toxic products. Indeed, the only regulation adopted by the CPSC since *Gulf South* is a ban on hazardous lawn darts. Different observers, however, have tended to believe that other factors were more influential in shifting the CPSC from rules to recalls.[62]

Virtually, all commentators seem to agree that the Occupational Safety and Health Commission's poor rulemaking record is ascribable in substantial part to its unhappy experience in judicial review. Shapiro and McGarity blame the high standard, i.e., "substantial evidence" that was included in the OSHA statute and embellished by judicial precedent. The courts' extremely demanding search for a "record" justification for OSHA rules have prompted opponents to challenge almost every health rule in the courts. This, in turn, has caused the agency to behave defensively going, in Shapiro and McGarity's phrase, "to extraordinary lengths to assemble a supporting record and to develop a supporting rational."[63] These authors note that at one point in the 1970s "all OSHA decisionmaking was brought to a halt while OSHA awaited the outcome of important court cases."[64]

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[57] Administrative Law Symposium: Questions and Answers With Professors Elliott, Strauss, and Sunstein, 1989 DUKE L. REV. 550, 553 (1989).

[58] P. Schuck and E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J 984.

[59] It is worth noting, however, that rules were overturned more often than any other agency actions picked up in the Schuck and Elliott sample. *Id.* at 1022. Rules were overturned or remanded to the agency in 56 percent of the cases picked up in the sample whereas agencies lost only 42 percent of their review proceedings involving adjudications.

[60] 701 F.2d 1137 (5th Cir. 1983).

[61] The fifth circuit's opinion has been uniformly criticized by expert commentators. *See, e.g.*, Latin, *Good Science, Bad Regulation, And Toxic Assessment*, 5 YALE J. ON REG. 89 (1989).

[62] *See* Scanlon and Rogowsky, supra note 14 at 16; Schwartz, supra note 16.

John Mendeloff agrees with the basic Shapiro and McGarity analysis.[65] According to his account, OSHA tends to promulgate relatively stringent rules as a result of interest group pressures and its enabling statute, combined with and leveraged by judicial precedents. OSHA's standards are actually being made tougher by the power that judicial review gives to interest group proponents of stringent health regulation. But, according to Mendeloff, that strictness, in his terms "overregulation," inspires the regulated industry to oppose the standards more vigorously, thereby virtually ensuring judicial review of the rules. Because the courts will run OSHA through a procedural and substantive gauntlet on review at the behest of producers, Mendeloff argues that the agency will pick its fights very carefully and spend excessive resources on the development of a record that it hopes will adequately support a rule on review. In short, says Mendeloff, "OSHA leaders hesitate about issuing standards for the same reasons that graduate students postpone taking their comprehensive exams: They aren't sure that they will pass."[66]

While some commentators argue that some courts are simply too strict with respect to some agencies in reviewing their rules, most seem to argue that the real impediment created by judicial review is uncertainty. Because the courts are relatively uninformed about what is important among the many issues thrown up by parties seeking review of a rule, and because they are technically and scientifically unsophisticated in analyzing the issues that they perceive to be critical to a rule's "reasonableness," the perception in the agencies is that anything can happen. This produces defensive rulemaking, if not abandonment of the rulemaking process.

It is important to note here that the influence of judicial review on agency rulemaking efforts is also controversial in a different sense than the one suggested by Professor Elliott's earlier skepticism. While many commentators believe that judicial review reinforces other impediments to rulemaking[67] and others argue that judicial review delegitimizes agency action and destroys its political acceptability,[68] yet others have argued that judicial review is itself a function of the general political atmosphere and is influenced both by public opinion and by the tendencies of other governmental institutions.[69] On this view, judicial review has been inhospitable to rulemaking because other political and institutional processes have been. The negative effects of judicial review should therefore be self-correcting. As a public recognition of the need for "deregulating" the rulemaking process emerges, judicial review is likely to follow. Indeed, some commentators already find a trend toward increasing deference.[70] Others conclude that it's too soon to tell whether the judiciary has adopted a less intrusive attitude and how that will effect agency rulemaking.[71]

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[63] Shapiro and McGarity, *supra* note 17 at 12.

[64] *Id.* at 12.

[65] John M. Mendeloff, *supra* note 17 at 21.

[66] *Id.* at xiv.

[67] *See, e.g.*, Mashaw and Harfst, *supra* note 3 at 225-228.

[68] *See, e.g.*, Pierce, *supra* note 23 at 18.

Executive Oversight. While judicial review arguably has been evenhandedly intrusive or constraining with respect to agency regulation and deregulation,[72] executive oversight has generally pressed agencies only in the direction of deregulation or nonregulation. As such it has been a sharp battleground between pro- and anti-regulatory partisans, and the academic and popular literature on the subject is extensive. The debate is waged at all levels, from the technical soundness of cost-benefit analysis to the constitutionality of both executive oversight and congressional interference with it. Heavy political armament is also brought to bear. Presidents have given OMB Directors and Vice Presidents considerable power to delay or quash agency initiatives. Congress meanwhile fights back with confirmation delays, funding quarantines, failure to reauthorize legislation facilitating executive review, and statutory provisions purporting to exempt agencies from all executive consultations.[73]

While executive oversight has had an impact on other agencies, EPA regulation has been the major target. The effects on EPA rulemaking of regularized presidential oversight through the Office of Management and Budget can be captured in two words: delay and displacement. Regulatory review at OMB clearly slows down the process of rulemaking, as would virtually any procedural step added to any process of policy formation. Delay here, however, is often thought to verge imperceptibly into displacement, that is, the substitution of OMB (or Executive Office of the President) preferences for EPA regulatory discretion. In part, this results from EPA discouragement. The agency sometimes simply abandons a rule that the administration disfavors. In other instances it means compromise or a complete revision of EPA policy.

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[69] *See* Glicksman and C. Shroeder, *EPA and the Courts: Twenty Years of Law and Politic*, 54 L. & CONTEMP. PROB. 249 (Autumn 1991).

[70] *See* Schuck and Elliott, supra note 58. Similarly Leavey and Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989), find an apparent increase in judicial deference toward EPA rulemaking. However, a good bit of that deference is in cases in which the EPA has scaled back the ambition of its regulatory initiatives or has developed new policies which might be described as "pro-development." The authors thus suggest that what may appear to be increased deference may only be increased substantive agreement.

[71] *See* McGarity, *supra* note 8 at 1451. Mashaw and Harfst, supra note 3, suggest that judicial review is part of a general legal culture that is and will remain skeptical of bureaucratic policy development in the form of legislative rules.

[72] *See* Garland, *supra* note 7, and Mashaw and Harfst, supra note 3.

[73] For a review of the literature and the controversy see Robert Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & CONTEMP. PROB. 127 (Autumn 1991).

Whether these delays and displacements are good things or bad things depends importantly on one's perspective on the overall OMB regulatory review process. If one's view is that the process produces better coordination of federal policy, more thoughtful regulation, and less costly intrusions into private activity, then delay and displacement are worth their costs. On the other hand, if one believes that OMB oversight replaces expert regulation with political expediency, provides preferential access to the regulatory process by regulated interests and subverts the congressional (and presumably the general political) will, the consequences of executive oversight appear negative.

Outside the EPA context it is unclear whether regularized executive review through OMB has had a dramatic impact on agency rulemaking. Because the Office of Information and Regulatory Analysis (OIRA) in OMB has limited capacity to review agency rules, most rules, even those that satisfy the criteria for "major federal actions," pass through with little OIRA input.[74] Yet it is hard to judge just what impact the OMB oversight has by looking at OIRA review patterns. As in the case of judicial review, agencies may organize themselves internally to avoid surprises at OMB. If so, they will engage in a form of "self-censorship" that gives OMB review an enhanced impact.[75]

There is even some uncertainty whether OMB review causes delay at EPA. In a statistical analysis of all EPA rules completed between October 1, 1986 and September 30, 1989, Kerwin and Furlong[76] found that in two of three of their statistical models of the rulemaking process, OMB review had no significant effect on the time required for rulemaking. On the other hand, one of their models predicts that OMB review increases the length of time required for any stage in the rulemaking process by two days for every one day that OMB holds the rule. Judged by the existing literature, both the "casual empiricism" of outside observers and the experience of EPA officials support the latter statistical finding.[77]

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[74] *See* Eads and Fix, Relief or Reform: Reagan's Regulatory Dilemma (1984).

[75] For the conclusion that OMB review exerts substantial influence over the content of agency regulations by a scholar who agrees in principle with the need for presidential review, *see* McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987).

[76] *See* Kerwin and S. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. OF PUB. ADMIN. RES. & THEORY 113 (1992).

[77] The magnitude of the effect may be small, however. Don Elliott argues in this volume that while OMB review affects EPA more than judicial review, that effect should not be overstated. Elliott, *TQM-ing OMB: or Why Regulatory Review Under Executive Order 12,291 Works So Poorly and What President Clinton Can Do About It*, 57 L. & CONTEMP. PROBS. 167 (1994).

Congressional Action. While the actions of the federal judiciary and of the federal executive establishment are often viewed as delaying or derailing agency rulemaking efforts, much congressional activity is ostensibly directed toward forcing its pace. Over the past two decades the Congress has included hundreds of action-forcing mandates, principally rulemaking deadlines, in federal agency legislation. The congressional tendency to demand action is in part a response to 1960s perceptions of a moribund and often "captured" agency regulatory process. That tendency has been sustained and consistently reenergized by the Congress' institutional competition with the Executive Office of the President as that Office, mostly through OMB, has increased its oversight and review of the agency regulatory process. An almost continuous history of Republican presidents and Democratic congresses has given partisan political impetus to this constitutionally sanctioned institutional competition. If ever there were an instance of the fulfillment of Madison's expectation that "ambition [would check] ambition," the last two decades of regulatory politics have provided that example.

Yet, it is also possible to see congressional action as responsible for agency underperformance in policymaking by rule. For one thing, many observers agree that the Congress has routinely over-promised in its modern regulatory legislation.[78] Statute after statute has declared that problem after problem would be solved through agency regulatory action, with scant appreciation of the scientific or political complexity of the task that was being set. Moreover, as it became increasingly clear that many of the objectives sought in this legislation would require massive research and development efforts, the Congress has not responded with funding levels that would make accomplishment of the objectives feasible. But, neither has it relaxed the statutory time tables or reduced the agenda previously set for agency attention. To some extent, therefore, the sense that agency rulemaking is faltering is the result of ambitions that cannot possibly be met with the resources provided.[79]

Congress also has acted directly to constrain the pace and direction of agency rulemaking. Before it was ruled unconstitutional, indeed afterward as well, the Congress appended legislative veto provisions to hundreds of agency statutes. Many of these were attached to rulemaking provisions, thus suggesting serious congressional concern with the good sense of agency proposals or likely proposals.[80] Congress has also used highly specific "appropriations riders" to partially repeal or to delay agency rulemaking activities.[81] And, it has matched the executive branch in its willingness to impose analytic review requirements on agency regulatory activity. All agencies must comply with the requirements of the National Environmental Policy Act[82] and the Regulatory Flexibility Act.[83] Compliance with only the former is subject to judicial enforcement, but routine compliance with the latter is also expected. These general analytic requirements in broad framework statutes are added to the specific, and sometimes highly technical analytic requirements, built into particular agency statutes. For example, the EPA labors under a statutory requirement that demands that any time it sets a requirement for the use of "best conventional control technology," the agency must demonstrate that it has analyzed the cost of taking a unit of pollution out of an industrial effluent stream using the prescribed technology in comparison to the cost of removing an equivalent unit of pollution from a municipal sewerage treatment works. And, in addition, the agency must also compare the incremental cost of the prescribed technology with the incremental cost of installing a somewhat less stringent "best practicable control technology."[84] It is hardly only the executive branch that is concerned about the cost-effectiveness of agency rulemaking.

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[78] John S. Applegate, *Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control*, 9 YALE J. ON REG. 277 (1992); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990); Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and 'Fine-Tuning' Regulatory Reforms*, 37 STAN. L. REV. 1267 (1985); David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 U.C.L.A. L. REV. 740 (1983).

[79] For example, Mashaw and Harfst, supra note 3 at 81-82, report that NHTSA was given the statutory mandate to "force the technology" of automobile safety design by a Congress that delayed funding for its research and test facility for nearly a decade and that subjected that agency, with all others, to continuous hiring freezes, if not outright staff reduction requirements, for most of its history.

While overpromising, underfunding, and contributing to analytic overkill in its legislation, the Congress' oversight activities seem directed primarily at chastising agencies for the slow pace of their regulatory efforts. The specter of administrative agencies failing to protect the public health and safety, as they have been ordered to do by congressional legislation, can often capture media attention and promote particular legislators' personal agendas. If some suggestion of bad faith or scandal can be added to agency laxity in the face of environmental or health crisis, so much the better. As a consequence, the oversight exposé is a popular form of Capitol Hill recreation. And, while obviously necessary and useful to some degree, Congressional bureaucrat-baiting has tended to delegitimate the administrative process politically and to further hamper the agency rulemaking process.[85]

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[80] *See generally* Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992); Matthew D. McCubbins, et. al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

[81] *See* Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456.

[82] 42 USC §4321 et seq. (1982).

[83] 5 USC §601 et seq. (1982).

[84] McGarity, *supra* note 8 at 1416.

[85] *See generally* Richard Lazarus, *The Neglected Question of Congressional Oversight of the EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 L. & CONTEMP. PROB. 205 (Autumn, 1991).

The Congress also has a tendency to combine statutory analytic demands with procedural complexity. Not only must an agency analyze a problem itself, it must provide opportunities for outsiders to challenge its analyses and provide analyses of their own. The comments of outsiders, or their testimony and cross-examination, must then be taken into account by the agency in justifying the rationality or reasonableness of its rules. Some commentators argue that procedural complexity in administrative rulemaking is the result of a congressional desire to maintain control over the bureaucracy in the interests of the coalition that passed the agency's statute.[86] Others suggest that procedural complexity is a legislative bone thrown to the unsuccessful opponents of regulatory legislation. Whatever the motivation, procedural complexity may render the regulatory program "cumbersome and unworkable."[87]

The Consumer Product Safety Commission is perhaps the best example of congressional mandating of innovative procedural requirements that ultimately proved disabling. Apparently hoping to infuse the new CPSC both with the zeal of outsiders for safety regulation and with the expertise of those with long experience with particular products, the Congress gave the CPSC unique procedures by which members of the public could petition for the promulgation of rules and through which outside "offerors" could develop the substance of those rules. Both the petition and the offeror processes turned into procedural nightmares,[88] and both were ultimately repealed by a Congress dissatisfied with the pace of CPSC regulation. But, that same Congress then substituted new and additional procedures and analytic requirements that, according to some commentators, doomed rulemaking thereafter.[89]

Public Acceptance. As was noted at the outset, this paper will not spend many lines discussing impediments to federal agency rulemaking that are not subject to improvement by some change in the institutional design of the rulemaking process. General public acceptance of rulemaking is clearly one such impediment. However, a brief discussion seems necessary for two reasons: First, we would do well to keep in mind the possibility that delay and inefficacy in the rulemaking process are just the flip side of valued aspects of our constitutional democracy. Our desire for improvement in the rulemaking process must be mediated by an appreciation of the degree to which "improvement" implicates multiple political values. Second, we would do well to distinguish between types of public acceptance, or perhaps we should say differences in the meaning of "public" that may bear on institutional design solutions. "The public" is both the general electorate and the "special interest" public that is directly affected by particular rulemaking efforts and that participates in one way or another in distinct rulemaking processes.

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[86] *See, e.g.*, McCubbins, Noll and Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 430 (1989).

[87] Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 424.

[88] For a description *see* T. Schwartz, *supra* note 16 at 35.

[89] *See* Scanlon and Rogowsky, supra note 14.

On the first point it may be enough simply to point out that many of the impediments to rulemaking previously discussed with respect to executive oversight and congressional action seem to be driven not just by political or ideological conviction, but also by the positive political acceptance of these activities in the electorate. Since at least 1976, presidential politics has contained a very substantial element of running against the federal bureaucracy. Successful presidential candidates have promised to get control of the regulatory bureaucracy in the interests of citizens and in some cases simply to restrain its activity. Moreover, the congressional penchant for overpromising and underfunding can be redescribed as a penchant for giving the electorate what it seems to want. The American public apparently sees no contradiction in demanding that the government achieve a high level of effective performance in the pursuit of collective ends while reducing governmental size, scope and expenditure.

Finally, the ability to call bureaucrats to account legally for their actions through judicial review seems to most Americans a basic constitutional right. And, as both executive and legislative departments have fallen into disrepute over the last several decades, the courts have appeared to many to be symbols of rectitude—a last line of defense against the depredations of politicians and bureaucrats. Any attempt to redesign the rulemaking process so that it functions better will have to take account of these general aspects of public acceptance. To some degree the institutions that now complicate the external environment of rulemaking are but vehicles for the expression of both general public sentiment and long-term constitutional commitments.

Public acceptance has, however, another dimension. The general public has quite diffuse ideas about what it demands from and how it wants to limit the federal rulemaking process. Indeed, general public opinion often supports more vigorous health and safety regulation while simultaneously decrying "big government" and "bureaucracy." In this political milieu, an act of rulemaking can redirect public attitudes. In The Struggle for Auto Safety, for example, Mashaw and Harfst describe the process of agency rulemaking that produced the current passive restraints requirements. Getting the rule into its "final" form took two decades. The rule's progress was often derailed by one or another institutional manifestation of public antipathy to NHTSA's regulatory proposals. Yet, the passive restraints mandate having finally emerged, public tastes seem to have been transformed. Safety that automakers long contended would not sell is now a prime element of their advertising campaigns. Manufacturers are competing vigorously to convince consumers that their cars are the safest and are finding optional safety features to be a crucial determinant of buyers' purchase decisions.

On the other hand, the manufacturers that are now making a virtue of necessity have not necessarily reduced their resistance to new safety requirements. Nor have safety partisans decreased their demands for further agency action. In the domain of special interest publics, NHTSA is still either an underperforming or an overbearing bureaucracy. And, it is these special interest publics who tend to mobilize the use of congressional, executive, or judicial techniques to promote or retard rulemaking activity. Consideration of the "public acceptance" of rulemaking must address these consistently ad-versarial publics as well. These parties have long-term economic, political, or ideological interests that are considerably less malleable than the preferences of the general public. Their tastes and values will not be reshaped, although they might be effectively managed, by reorganizing the external environment of rulemaking. Moreover, the rulemaking process to some degree exacerbates the level of adversariness that might be expected from the "special interests" and makes the politics of policymaking more difficult.

It has long been hypothesized, for example, that several of the old line adjudicatory agencies resisted rulemaking because of its political costs. This was the conventional wisdom with respect to the National Labor Relations Board,[90] which was continuously exhorted by commentators to utilize its rulemaking powers.[91] Barry Boyer's study of the Federal Trade Commission's rulemaking[92] suggests that the NLRB and FTC agencies were not just being timid. While the FTC had hardly lived a nonadversarial life prior to its attempts to shift to rulemaking, the political adversariness of those efforts were orders of magnitude beyond anything the Commission had previously experienced. Moreover, as Boyer acutely observes, the tasks and processes of rulemaking are not nearly so effective at keeping the agency well-informed about the attitudes and activities of directly-affected publics as is the adjudicatory process. The close and continuous association with directly-affected parties that is the hallmark of adjudication tends to be lost in the context of rulemaking.

In Boyer's view this is an important explanation of why the FTC mistook its political mandate and destroyed the efficacy of its rulemaking initiatives with respect to the "publics" that counted. Ironically, it would appear that while agency adjudication exalts adversariness as a process value, it also controls the form of adversary combat and limits its scope. To manage the level of rulemaking adversarialness generated by the special interest publics in their immediately regulatory environment effectively, agencies may need some institutional devices by which they can reduce the perceived stakes in rulemaking proceedings and constrain the armaments of the combatants. It is not obvious that any such techniques exist, but we will later suggest some possibilities.

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[90] *See* Bernstein, *The NLRB's Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970).

[91] That the NLRB has finally done so is, of course, no guarantee that it will ever do so again. The commentators, therefore, continue the exhortation. *See* M. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991).

[92] Boyer, *supra* note 31.

A concern with directly-affected publics also throws into sharp relief the problem of any proposal for institutional reform, i.e., getting there from here. John Mendeloff's discussion of OSHA rulemaking is particularly pertinent.[93] In Mendeloff's view, remember, OSHA rulemaking is rendered almost impossibly adversarial by the requirement that it regulate risks extremely stringently. Mendeloff argues that this statutorily and judicially imposed requirement lies behind both the fierce opposition of industry to OSHA regulation and judicial demands for a very high level of proof that OSHA's requirements are both needed and helpful.

Mendeloff concludes that both workers and employers would be better off with a system that permitted milder regulation and lower standards of evidentiary proof. But, as he explains in some detail[94] the institutional reforms that would permit this more moderate approach might also permit stringent regulation on little proof or the abandonment of effective regulation in the face of employer opposition. Hence, the directly-affected publics, and OSHA itself, seem locked into a suboptimal regulatory scheme. Mendeloff's analysis therefore pointedly reminds us that any institutional reforms of rulemaking must take into account the difficulties in getting public acceptance of those reforms by the directly-affected, special-interest publics.

B. Internal Factors

Not all problems with agency rulemaking can be attributed to the external environment. Some problems result from factors within the agencies themselves. For present purposes we will group these internal factors into four sets: incentives, procedures, structures, and management. There is some overlap among these categories. Choices of procedures, internal structures, and employee incentives might be viewed as managerial decisions. Hence, all these topics might be treated under the heading "management." Because certain aspects of the internal environment are not easily subjected to managerial reform or restructuring, however, it seems useful not to lump everything into the management category. Indeed, as we will discuss in the next section, a number of aspects of the internal environment of agencies are either loosely or tightly connected to the external environment.

Incentives. Students of bureaucracy have identified a number of issues relating to the incentives of bureaus or bureaucrats. For present purposes we will focus on three aspects of the incentives of bureau employees that are recognized to have a direct bearing on the efficacy of agency rulemaking efforts.

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[93] *See* Mendeloff, *supra* note 17.

[94] *Id.* at 231-45.

The first of these is professional orientation. It is now customary to recognize that those bureau employees who are hired because of their particular professional expertise are likely to bring parts of their professional culture with them to the bureau. The pursuit of values that are a part of the professional culture may inhibit performance within the bureau, including rulemaking performance. Mashaw and Harfst, for example, discuss the competition between safety engineers on the one hand and lawyers and economists on the other in the formulation of rules at the National Highway Traffic Safety Administration.[95] Safety engineers tended to believe in technological fixes for safety problems; economists tended to believe that government specification of performance or design standards in competitive markets were problematic; and lawyers tended to insist that all doubts about the legality of agency actions should be cured before going forward with a rule. The differing perspectives among these professionals has been a major cause of delay and dissatisfaction within the agency's rulemaking process. At times professional competition has seriously impeded the cooperation necessary to complete rulemaking proceedings successfully. This adversary atmosphere among professionals has been documented by other observers at other agencies.[96]

But internal adversariness is not only a function of professional orientation. Institutional roles may also cause noncooperation. A constant complaint in regulatory agencies is the failure of the research arm of the agency to provide information that is directly relevant and useful for the rulemaking branch.[97] This may occur even when the offices are staffed by people of similar professional background. Again, Mashaw and Harfst[98] document the competition and controversy that plagued relationships between the research personnel and the rulemaking staff at the National Highway Traffic Safety Administration. Both staffs were populated primarily by safety engineers. Their institutional roles, however, drove them to have strikingly different priorities. The research arm of the agency wanted to do high quality research that produced valid scientific findings. The rulemaking staff was more interested in having research that was timely and directly relevant to the support of its contemporaneous rulemaking efforts. As a result some of the agency's rules had poor factual support and much of the agency's research never found its way into the rulemaking docket.

Finally, rulemaking may be inhibited by agency employees' continuous desire to maintain control over the policymaking process. In virtually every agency the initiation of a rulemaking project means beginning a process that will involve many offices and many levels of the bureau in the effort. Staff committed to policy change may avoid the rulemaking process not only to avoid delays or stalemate, but also because the policy that ultimately emerges from internal discussions, not to mention internal struggles, may bear little resemblance to the policy that they believed necessary when they initiated the rulemaking process.[99] These considerations may have a direct bearing on the form that policy takes. If career staffs can issue "guides" or "memoranda" or "manuals" without going through the tiers of the agency bureaucracy, then by avoiding rules they may simultaneously avoid delay and political oversight by noncareerists.

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[95] Mashaw and Harfst, *supra* note 3 at 203-04.

[96] Fred Emery, Rulemaking as an Organizational Process (Report prepared for the Administrative Conference of the United States, 1982).

[97] *See* Cornelius M. Kerwin, The Management of Rulemaking (mimeo, 1992).

[98] Mashaw and Harfst, *supra* note 3 at 172-200.

Other more general incentives held by bureau employees may impede rulemaking as well. Employees' desires for leisure, or for a nonstressful work life may sometimes intrude. Bureaucrats also may have personal axes to grind, political ideologies that hamper their functioning, or unreasonable desires for fame or reward. These, however, are personal idiosyncracies that are likely to respond to specific managerial initiatives, not to broad reform policies. The adversariness and noncompetition endemic in conflicting professional cultures and institutional roles and the avoidance techniques that may be developed to preserve staff policy autonomy are more systematic internal bureaucratic incentives that might be thought to afflict, to some degree, every rulemaking process.

Procedures. Professor Strauss'[100] analysis of the Interior Department suggests the need to focus on internal procedures. Part of the reason that Interior's employees avoided the rulemaking process was that the internal procedures for the adoption of a rule were so complex and laborious.[101] Other aspects of procedure have also been identified as impeding rulemaking success.[102] It is commonplace, for example, to complain that agencies have done a bad job of setting agendas or priorities for rulemaking. The failure of the agenda-setting process may lead to either inaction or to decentralized priority setting that squanders the agency's resources on unimportant issues or spreads its resources so thin that important rulemaking tasks cannot be accomplished.

Inadequate procedures for the generation of needed information has also been identified as a major procedural flaw in some agency's rulemaking processes. The basic complaint is that the process fails to integrate the research and rulemaking arms of the agency in ways that makes research relevant to the rulemaking effort. As we have seen, this problem may be differently characterized as a problem of competition between bureaucrats having different institutional roles. Yet, obviously, agency procedures can do a better or worse job of integrating these roles and producing cooperation. A similar problem has been identified with respect to agencies that use outside contractors rather than internal research organizations to generate information. The failure to integrate the work of the contractor into the agency and to monitor performance effectively often produces inadequate results for purposes of developing or supporting rules.

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[99] Strauss, *Rules, Adjudications and Other Sources of Law in an Executive Department: Reflections on the Interior Departments Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1245-47 (1974).

[100] *Id.*

[101] Peter Hutt (and others) have also noted that the addition of levels of review of FDA rules within HHS seriously compromised that agency's commitment to policymaking by rule. Letter from Peter Hutt to Douglas Castle, Chair, Carnegie Task Force on Regulation. (On file with author.)

[102] On these procedural difficulties *see* generally Cornelius Kerwin, *supra* note 97, and Neil Eisner, *Agency Delay in Informal Rulemaking*, 3 AD. L. J. 7 (1989).

Procedures for internal consultation both horizontally and vertically within agencies have also been criticized. "Horizontal consultation" involves the cooperation of sub-organizations at essentially the same level of authority within the agency that are effected by or interested in a rule. "Vertical consultation" relates to the relationship between the line staff that carries the primary responsibility for policy development and those staff agencies and high level executives that must "sign off" in order for the rule to be approved. Ineffective processes for consultation horizontally may produce either endless bickering among subunits of the agency (followed by overloading of officials at higher levels who have to iron out the difficulties) or poor substantive policy because all the units with relevant information and perspectives on the problem were not included in the process. In general, poor vertical consultation is blamed for low moral levels and inertia among line bureaucrats and for significant delays in the rulemaking process. Delay may result from the slowness with which all of those levels that must "sign off" do so, or from what is known as a "late hit" in the approval process. A late hit is an objection to the rule that is raised at a high level, late in the process, and that sends the rule back to the drawing board, often for complete and lengthy rethinking.

Finally, agency procedures are faulted for lack of clarity. Delay and failure, it is claimed, may result from the inability of agency employees to know exactly when they are expected to carry out and complete their rulemaking functions or how those functions are integrated into the overall rulemaking process. They thus may make decisions that are perfectly sensible from the point of view of their subunit, but that have serious delaying effects or resource costs for other entities that are involved in the rulemaking effort.

Structures. Although it is to some degree artificial to separate structures from procedures, commentators on the internal rulemaking process have tended to think of the "structure" of rulemaking as relating to the choice of a general model of organization for the rulemaking effort. McGarity, for example, identifies four different models for the rulemaking process at EPA (and elsewhere).[103] Each has certain strengths and weaknesses.

The "team" model is one that gives basic responsibility for a rule to a group composed of representatives of all the institutional subunits within the agency that have an interest in the outcome of the rulemaking process. The team, and particularly the team leader, have responsibility to ensure that all interests and perspectives have been considered and worked through. When it works well the particular strengths of this model are that it makes all the relevant information available for the development of a high quality rule and ensures that the rule will be unlikely to suffer "late hits." While Emery's study for the Administrative Conference takes the position that the team approach is the only effective one,[104] McGarity notes that the team approach can be extremely resource intensive, can result in mistakes because of "group think," and may shift the locus of decisionmaking away from the politically accountable personnel in the bureau.

The team model contrasts starkly with the "hierarchical" model (or in Emery's terms "linear" model). In the hierarchical model a particular operational unit takes complete responsibility for rule development. It must then get approval from all the other units that have the capacity to block the rule as it proceeds up to the final decisionmaking levels in the agency. The hierarchical model has the advantage of unity of command and expedition, at least initially. It also usually gives decisionmaking authority to the most expert unit in the agency. On the other hand, this model may produce rules that suffer from tunnel vision. And if the superiors up the chain of command have no independent capacity to evaluate the work product, it may result in bad decisionmaking. On the other hand, if the higher ups do conduct a serious review the hierarchical approach may produce late hits because of lack of consultation in the early stages.

A variation on the hierarchical model is one that McGarity terms the "outside adviser" model. In this model a single office has principal responsibility, but is expected to consult others for advice. This produces multiple perspectives, but maintains unified authority to press the process forward. The disadvantage of this model is its tendency to lapse into either a crypto-team or pseudo-hierarchical form. The multiple perspectives ideal may be a fiction, or, alternatively, the outside advisors become obstructionist team members without clear responsibility for performance.

Eschewing any attempt to generate horizontal cooperation, some agencies have instead used an "adversarial" model. Here subunits of the bureau are recognized to have different perspectives and interests and they are arrayed against each other in adversarial combat before the real decisionmaker in the agency. This model has the capacity to inform the final decisionmaker concerning the true strengths and weaknesses of the rulemaking case. It maximizes upper-level discretion and accountability and may generate a creative tension among staff that produces good work. On the other hand, as the NHTSA example illustrates, adversariness may lead to levels of noncooperation, which are themselves dysfunctional. It is also extremely demanding of the time of upper-level personnel and may clog the channels of decisionmaking, retarding progress on all the agency's regulatory activities.

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[103] McGarity, *The Internal Structure of EPA Rulemaking*, 54 L. & CONTEMP. PROB. 57 (Autumn 1991). For a much more extensive discussion of the whole question of organizing regulatory analysis in the rulemaking process *see* THOMAS MCGARITY, REINVENTING RATIONALITY (1990).

[104] Emery, *supra* note 96.

McGarity also describes a "hybrid" model in use for some years at the Environmental Protection Agency. That model combined aspects of the team model with those of an adversary process. It was not applied to all of EPA's rules, but for 20 to 30 rules each year the administrator's office created a special "options selection-rejection process." With respect to these rules the lower-level decisionmaking process adhered closely to the team model, but at crucial junctures options review meetings were held among high-level agency officials and team members. At those meetings the high level officials and team members chose which regulatory options the agency would pursue in the remainder of the essentially team-based rulemaking process.

Because these meetings to determine future options were, in effect, means of resolving critical differences of opinion within the teams at high levels in the agency, the options review process itself was rather adversarial. In McGarity's opinion, the EPA hybrid model was quite successful. He summarized the advantages in the following paragraph:

> EPA's unique options review process has facilitated the incorporation of comprehensive analytical thinking into the agency decisionmaking process in several ways. First, it retains the team model's capacity to bring different perspectives to bear upon information-gathering and data evaluation. Second, by forcing lower-level staff to analyze a set of realistic options prior to the options review meetings, it naturally expands their horizons. Third, by giving the regulatory analysts and the technical staff a day in court before the highest level agency decisionmaker earlier in the process, while many options are still alive, it interjects a creative adversarial note into the agency deliberations thereby reducing the potential for "group think." Fourth, the process reduces the risk of alienating the program office staff, because the deputy administrator hears both sides of all arguments and often decides issues in the presence of the staff, and not later after an opportunity for

> "insider" lobbying. Fifth, by forcing all branches of the agency to identify options early in the process, it helps insure against the "late hit" phenomenon, where one office brings up the option very late in the process and urges the program office to slow down the process while that option is being considered. Finally, to the extent that the administrator or deputy administrator is a proponent of comprehensive analytic rationality, the options review process can move the agency toward that way of thinking and away from techno-bureaucratic rationality."[105]

Because the structure of agency rulemaking is so closely linked to procedures it seems obvious that the choice of one or another of these models of rulemaking will have a crucial effect on the procedures that are chosen to set the agenda, generate information, facilitate consultation and maintain a rulemaking schedule. Moreover, because every model has both strengths and weaknesses, and because the strengths of one model tend to be the weaknesses of another, it seems unlikely that a single approach will make sense for all agencies all the time in their rulemaking efforts. The studies of agency internal processes and structures for rulemaking seem to justify the basic position of the so called "contingency theory" of bureaucratic organization. According to that theory about all that can be said by way of theoretical generalization is that not all organizational techniques are as good as all others, but no organizational technique is clearly best.

McGarity echoes this contingency theory view in his conclusion that "the foregoing analysis of the five most prominent models for structuring regulatory analysis into the decisionmaking process suggests that no single model is best for all regulatory programs."[106] He nevertheless makes a number of suggestions about "rules of thumb" in choosing an appropriate rulemaking model. These suggestions which vary with the degree of routinization complexity, uncertainty, and political divisiveness in programs also parallel some conclusions of the organizational theory literature.[107] For example, agencies that engage in relatively routine tasks under statutes setting clear policy goals and leaving only modest agency discretion might best operate through a hierarchical model. By contrast, where tasks are complex and program instructions uncertain the team and adversarial models will provide a much better chance for coordinating the differing sorts of expertise and perspectives that are necessary for successful completion of the rulemaking task.

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[105] Thomas McGarity, REINVENTING RATIONALITY, 261 (1991). In previous portions of his book McGarity contrasts techno-bureaucratic rationality, a variation on Lindblom's famous "muddling through" process, with more systematic policy analytic processes that attempt to canvass all goals, options, methodologies and relevant facts exhaustively prior to commitment.

[106] *Id.* at 263.

[107] *See generally* C. PERROW, COMPLEX ORGANIZATIONS (2d ed. 1979); ORGANIZATIONAL ANALYSIS: A SOCIOLOGICAL VIEW (1970); James G. March & Herbert A. Simon, ORGANIZATIONS (1958); Selznick, *Foundations of the Theory of Organization*, 13 AM. SOC. REV. 25 (1948).

We cannot here proceed down the many highways and byways that this contingency approach to organizational design entails. One caveat may be useful, however. While McGarity assigns his model types to certain domains of regulatory or rulemaking activity at the programmatic level; suggesting for example that the hierarchical model might be appropriate in standard form economic regulation, whereas the team or adversarial models are more suitable to social regulation, one might wonder whether the unit of analysis chosen is too abstract. Programs whose rulemaking processes may seem generally well-suited to hierarchical organization, for example, rulemaking for benefits administration at the Social Security Administration, may change complexion radically around particular issues (the relationship between AIDS and the disability definition, for example) or in differing time periods.[108] But this merely illustrates another general tenet of the contingency theory of organization: rules of thumb will not always work either because successful organization design must constantly shift with context and subject matter.

Management. Certain aspects of the internal operations of the agency are not directly related to the structures and procedures of the rulemaking process but they nevertheless bear critically on it. Rulemaking agencies thus have been criticized for "poor management" in several categories. One is the recruitment and development of staff who can operate effectively in the agency's rulemaking environment. In particular it is urged that agencies understand that certain of their middle level staff will function primarily as "rulemakers." Hence, they should be trained in ways that give them all the necessary perspectives on the rulemaking process as well as the skills to bring together the disparate parts of the agency necessary to complete an effective rulemaking proceeding.[109]

Agencies are also faulted for failing to have strategic norms that will guide the agency rulemaking staff in dealing with unexpected contingencies. In short, agencies are urged to attend to those contingencies in their environment that, while unpredictable in particular proceedings, are relatively likely to occur in a substantial number of instances. The idea is to develop strategies for dealing with impediments when they arise.[110]

Finally, agencies are criticized for their failure to develop a set of shared values that can both motivate personnel and reduce internal competition and noncooperation. This is a vague but recognizable complaint in many organizations. It is often described simply as a failure of "leadership."

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[108] *See* discussion in Mashaw, "Disability Policy in a Time Retrenchment", in T. Marmor and J. Mashaw eds., SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS 151 (1988).

[109] *See* Emery, *supra* note 96.

[110] *Ibid.*

C. Connecting the External and Internal Environments

Other things being equal, an agency's structuring and management of its internal environment will affect the quality and timeliness of its rulemaking effort. There is little to be said for a management that ignores systematic problems of employee incentives, for failure to attend carefully to the construction of an appropriate consultative process or for the lack of a clear agenda or schedule as a means of guiding and motivating staff. For two important reasons, however, these truisms may not translate directly into satisfactory proposals.

First, the current state of our knowledge concerning the efficacy of particular managerial techniques is quite limited. In the most recent survey of the literature on the management of rulemaking, Cornelius Kerwin, Dean of the School of Public Affairs at American University concludes that "existing case studies are better at identifying what their authors consider shortcomings in the management of rules than at establishing which structures and techniques materially improve rulemaking." Moreover, Kerwin's assessment of the only statistical study on the management of the timeliness of rulemaking, one in which he was co-author, was that little could be concluded from it. The reason is one that has plagued many statistical efforts in the past: "Some of the independent variables included in the model . . . were effective surrogates for certain management variables, but most were not. The model they used[111] would have to be respecified and tested in a larger number of agencies before any conclusions about the efficacy of selected management devices could be reached."[112] Dean Kerwin says nothing about whether he believes that effective surrogates for management variables could be specified.

Moreover, as was previously mentioned, few scholars in the field of organizational theory believe that there is a single best way to organize and manage bureaucratic undertakings. General recommendations or conclusions tend to be poorly supported, subject to so many exceptions that they provide little guidance, or bromides that do little more than repeat the conventional wisdom. The first three conclusions in the Emery study done for the Administrative Conference are illustrative.

Conclusion one, for example, states "structural reorganizations frequently do not result in any fundamental improvement to internal systems." This statement is poorly supported by the study. It is based on one episode. Moreover, it seems to contradict the only strong recommendation the study makes, that the team structure is the only effective one for the rulemaking process. This is not, of course, to say that the conclusion might not be correct. Indeed, since the conventional wisdom is that most structural reorganizations in bureaucracies are for personnel reasons, it would be unlikely for them to make "fundamental improvements" in internal systems. On the other hand, surely some level of structural inappropriateness must inhibit rulemaking, or any other task-oriented process.

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[111] Referring to Kerwin and Furlong, *supra* note 76.

[112] Kerwin, op cit. *supra* note 97 at 69.

The second conclusion is that "an adversarial atmosphere often develops among technical experts, legal counsel, and other staff offices working together on a regulatory project." In one sense this is a bromide—it is well understood that professional roles and institutional roles create conflicting perspectives. The implicit suggestion may be, however, that "adversariness" is the ill to be avoided. Which, of course, is true—except to the extent that adversariness is needed in order to plumb the depths of particular policy issues and ensure that agency processes do not become exercises in "group think." In short, organizations should have enough adversariness, but not too much. The rule might be stated: "Avoid adversariness, except where it produces necessary testing of data and analysis." The exception swallows the rule. Or, more precisely, the rule and the exception could be reversed with little or no loss of usefulness. ("Use adversary structures to test data and analysis, except where it inhibits necessary cooperation.") To be sure, focusing on adversariness points to an issue that must be addressed, but it tells an agency manager little about how to attend to it in the context of his or her particular managerial environment.

Conclusion three states "to ensure accountability, federal agencies frequently retain signature authority at the higher levels. This results in inefficiency and staff/line coordination problems." Perhaps. But, as the first phrase of the conclusion states, retaining high-level authority ensures accountability. There is a tradeoff here and the conclusion tells us little about how to deal with it.

Indeed, one might imagine the first three conclusions of the Emery study as giving an agency rulemaking manager the following advice: "Don't bother with structural reorganizations; avoid adversariness and decentralize decisionmaking in order to increase efficiency." A particular manager might sensibly respond "I intend to reorganize my agency to preserve my authority and to ensure adversarial presentation of differing opinions. Why? Because, given my agency's external environment, ensuring accountability is the most critical managerial issue that I face and, believe me, I am going to be held personally responsible for whatever policy emerges."

This contextual approach leads us to the second problem with focusing on managerial reforms, their obvious importance notwithstanding. As my hypothetical agency manager's response suggested, many managerial moves that may seem internally dysfunctional are a response to the external environment. When we said earlier that all other things being equal management matters, we were really saying that given a particular external environment, management of the agency's internal structure and processes may have substantial effects on the agency's success. But this is also to say that internal structure is a function of the external environment. When one looks inside an agency and finds certain internal conditions that seem dysfunctional in pursuing the agency's rulemaking task one may be looking at simple bad management. Or, one may be looking at a response to some external stimulus or requirement. Because agencies must structure themselves and operate internally in order to succeed or survive in the external environment, the latter explanation will often be promising. Indeed, the Emery study's third conclusion, by referring to accountability, recognizes the influence of external factors on internal arrangements. But, it then ignores these effects by suggesting that agencies should reduce accountability in order to improve efficiency and staff/line coordination.

Actually the same point can be made in relation to the Emery study's second conclusion concerning adversarial competition between "technical experts, legal counsel and other staff offices." The obvious question is why the agency doesn't let the "technical experts" get on with the job and tell the other staff offices, including the Office of General Counsel, to facilitate their work and otherwise get out of the way. The all too obvious answer is that this might not be a successful strategy given the external environment. The economic analysis staff must have real power and input in order to defend the agency's policies effectively when they are reviewed at OMB. Similarly, a general counsel's office without clout in the rulemaking process is likely to be ineffective in ensuring that the agency's rules will withstand judicial review.

Mashaw and Harfst, for example, describe in great detail the ways in which the power structure and rulemaking processes within the National Highway Traffic Safety Administration were reshaped over the course of two decades to protect the agency against these external threats. In the process, lawyers and economists achieved at least parity with, and perhaps dominance over, safety engineers. That these changes thwarted the rulemaking process and shifted the agency's enforcement strategies toward a recall regime having little safety payoff was not the result of "bad management." At least according to the Mashaw and Harfst story, these internal changes were necessary in order that the agency could survive in its political and legal environment. And, the threatening nature of that environment for other agencies seems to be well documented by the literature previously reviewed. It is plausible to conclude, therefore, that if one wants to improve rulemaking performance one would do well to attend first to external environmental factors.

This conclusion is, of course, both tentative and qualified. Even in a highly threatening environment, good management is better than bad management. And, given a benign external environment, managerial initiatives might be the most important elements of a reform strategy. They may even be of signal importance if it is determined that the external environment of rulemaking is too entrenched to be subject to any significant reform. But everything cannot be analyzed simultaneously, (at least not in prose), however closely interconnected. For the moment, therefore, the external environment is the issue that will hold our attention.[113]

III. Focusing Reform Energies

A decision to emphasize external rather than internal environmental factors in rulemaking narrows the field of inquiry, but leaves it very large indeed. Prior commentators have identified a large number of external causes for the torpidity and ineffectualness of the federal agency rulemaking process. Assuming that all these factors make some contribution to the overall problem, there is much to be said for pursuing a strategy of multiple remedies.

This strategy would, however, produce a very diffuse reform agenda. A series of problems have been identified with respect to both political control by Congress and the executive and legal control by the judiciary. Each of these "problems" may have multiple solutions, or less ambitiously, multiple ameliorative strategies. Any analysis of the costs and benefits, advantages and disadvantages of the alternative strategies for addressing these numerous problems would go on for hundreds of pages. We need somehow to narrow our topic.

One way to focus reform energy would be to consider only those alternatives that seem politically feasible. For example, a recommendation to Congress that it unify its oversight activities so that agency rulemaking efforts are neither overburdened nor whipsawed by contradictory oversight instructions sounds like a good idea. Indeed, it is a good idea. But, since it probably requires a reorganization of Congress (eliminating overlapping committee and subcommittee jurisdictions)[114] that also probably contradicts the imperatives of most congressional reelection strategies (being seen to have power about issues of moment)[115] this sort of reform is almost certainly not in the cards.

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[113] In other contexts, in particular the reform of a high volume and relatively routine adjudicatory system, I have concluded just the opposite. *See* J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).

[114] *See* KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991); STEVEN SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS (1984); RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973). *See also* Thomas W. Gilligan & Keith Krehbiel, *Asymmetric Information & Legislative Rules With a Heterogeneous Committee*, 33 AM. J. POL. SCI. 459 (1989); Keith Krehbiel, "Sophisticated Committees and Structure-Induced Equilibria in Congress," in Congress: Structure and Policy (McCubbins & Sullivan eds., 1987); Keith Krehbiel, *Why Are Congressional Committees Powerful?* 81 AM. POL. SCI. REV. 929 (1987).

On the other hand, with respect to a large proportion of possible remedies, political feasibility is anyone's guess. Can Congress make better strategic use of time limits, hammers, and other action-forcing legislative devices? Can the Executive Office of the President be convinced to reform the OMB (or Council on Competitiveness) review process? Can judicial review be made more focused and effective and, therefore, less disabling? There are surely concrete circumstances under which each of these questions might easily be answered either yes or no. How they are answered depends very much on the predisposition of the observer. Reform skeptics are likely to think that politics will hamper any effective effort; reform optimists may believe that a well-constructed case can eventually produce reform, apparent political obstacles notwithstanding. Analysis of political feasibility tends either to leave all potential targets of reform on the agenda or to shrink the agenda to the politically trivial and, therefore, predictably ineffectual.

There is, moreover, a more serious difficulty with setting reform priorities on the basis of political constraints. Such an approach tends to treat the external political forces that surround the rulemaking process as mere obstacles to the accomplishment of sensible rulemaking goals. But this is a cartoon of the real situation. Pressures exerted on rulemaking in the Congress, the Judiciary or the Executive represent distinct, but important, political values. What is needed is some normative vision of rulemaking that will assist us in identifying reform targets in the external environment that are serious impediments to rulemaking and that are inconsistent with our political values.

Such a normative vision is not very difficult to articulate. The development of agency rulemaking processes over the past 25 years highlights two major concerns, i.e., that rulemaking be structured (1) to provide fair opportunities to participate by affected interests and (2) to produce reasonable policy choices given the goals of the program and the relevant facts (however complex and uncertain these may be). Built into these notions of fairness and reasonableness are subsidiary norms of timeliness and resource conservation. A process too long delayed or too expensive may become both unfair and unreasonable.

In a polity that seeks to promote these norms for administrative rulemaking the external environment should be structured to promote a fair and reasonable rulemaking process. Private participants should have equal access to decisionmakers and use that access to inform the agency concerning both the facts and the proper contextual understanding of the goals that the particular program should promote. External political institutions (Congress and the Executive) should seek to ensure both diligent implementation and that the pursuit of particular programmatic missions do not become ends in themselves —so disconnected from broader understandings of the place of the program in overall societal values that they produce unreasonable results. Legal review by the courts should ensure that the authority exercised is authority legitimately conferred, that it is neither misused nor neglected, and that the basic norms of participatory fairness and substantive nonarbitrariness are respected.

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[115] There is, of course, much dispute about what politicians "maximize" and how they seek to maintain their positions. *See* MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF THE POLITICAL PROCESS (1981); RICHARD FENNO, HOME STYLE (1978); CONGRESSMEN IN COMMITTEES (1973); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

The challenge, of course, is to design the procedural and institutional mechanisms that will facilitate this ideal external environment without simultaneously encouraging the abusive use of these multiple mechanisms for external influence or control. How can checks and balances be established without creating "obstacles" instead? How can we deal with the all-too obvious tendency of seriously affected parties to manipulate these needed external constraints for personal or partisan advantage? Or to put the matter more cheerfully, how can private interest be harnessed to the public purpose of a fair and reasonable rulemaking process?

I want to suggest that this last more positive formulation of the institutional design issue may also give us some analytic purchase on the problem. If we think about "abuse" of the rulemaking process as a natural outgrowth of private interests, we have defined our problem as a problem in the management of incentives. What we want to do, somehow, is to structure procedures and institutional relationships such that the incentives to exert influence by information and persuasion are maintained, as are checks on legality and political "tunnel vision," while opportunities for strategic obstructionism are eliminated. Not so easy, as any institutional architect knows; but there may be some insights to be garnered here nonetheless. While incentives do not translate directly into behaviors,[116] careful attention to the incentives built into current arrangements might convince us that improvements are possible, that is, that we can eliminate some opportunities for abuse without simultaneously losing the valuable checks and balances that the external environment of rulemaking provides.

In order to get a grip on this analytic handle on rulemaking reform I have developed something called the "rulemaking review game." The basic idea of the game is so simple as to be obvious. It assumes that to the extent that an opponent of rulemaking (regulatory or deregulatory) perceives the use of an external obstacle to rulemaking to have a higher expected value than failing to use it, that external constraint will have a higher probability of being activated. The question then will be whether we can discover, in current rulemaking processes, situations in which we would like to change the incentives of actors and thus change their calculations about whether to actuate some external constraint. If so we have found a place that we would like to reshape the rules of the game in the interests of a better rulemaking process.

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[116] Indeed, I have argued elsewhere that this is one of the most serious mistakes that a policy analyst can make. *See* T. MARMOR, JR. MASHAW AND P. HARVEY, AMERICA'S MISUNDERSTOOD WELFARE STATE 219-22 (1990).

To make this abstract idea more concrete we will first explore the rulemaking review game in the context of judicial review. As we shall see, this focus on the incentive structure of actors may lead us to rather different proposals for reform than are current in the literature. We will then explore what the rulemaking review game has to teach us with respect to external political controls.

A. A Game-Theoretic Analysis of Judicial Review

Game theory is a subdiscipline in mathematics and economics that seeks to model the way in which choices should be made by rational actors, that is, actors who are seeking to maximize their own returns given certain available alternatives.[117] There is no claim by game theorists that actors will necessarily behave rationally. The game-theoretic structure merely makes clear what an actor's incentives are and how that actor might maximize its expected returns.

Obviously when deciding whether to bring a legal action or whether to comply with an agency regulation, a regulated party may not behave in accordance with a simple game-theoretic structure. Hence, for example, a party who objects ideologically to any and all regulation might have very high negative payoffs to compliance, whereas a party that prides itself on being a "good citizen" might have high negative returns from resistance to legal requirements. In the illustrations that follow we will not attempt to capture these sorts of preferences, although in most cases the game structure could be modified to take them into account. Instead we will speak in terms only of straightforward economic costs and benefits assumed to influence the modal person or firm.

To Comply or Not to Comply. Imagine for illustrative purposes that we are considering a regulation by the National Highway Traffic Safety Administration (NHTSA) that requires that certain equipment be included in new passenger cars. Under current law such a regulation is immediately appealable to a court of appeals. Because NHTSA regulations almost always allow significant lead times for compliance, failure to comply pending an immediate appeal will usually impose no costs on the manufacturers. The question for the manufacturers then is whether to begin immediately to work toward compliance or to challenge the rule in court.

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[117] For an accessible introduction *see* ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY (1990).

To simplify matters further we will ask first simply whether a manufacturer will comply or not. We will then consider whether the manufacturer will bring an action to seek to invalidate the rule. The two questions are obviously connected, because if the rule remains in effect a noncomplying manufacturer will at some point begin to incur penalties. For present purposes, however, we will assume that some firm will attack the rule and that during the pendency of that action there will be no penalties for noncompliance.

Because there are no penalties for noncompliance, the strategic situation is not one in which the manufacturers view themselves as in a "game" with the federal agency. The important question for them, instead, is what their competitive position will be vis-à-vis other manufacturers should they comply or not comply with the rule. Preenforcement Review Game Number One illustrates this competitive situation. It makes the following assumptions: Compliance is costly and costs are relatively uniform. Here we assume that there is a compliance cost of five for each model year. There is a further cost of two if the manufacturer is the only one to comply, because that manufacturer's costs and prices will go up relative to its competitors and it will lose some market share. These numbers are arbitrary, but the structure of the current game does not make that important so long as no manufacturer receives benefits from compliance. The direct costs of compliance have been made greater than the market share losses from sole compliance because that represents the usual structure of demand elasticity in the automobile market—manufacturers do not lose a dollar for every dollar in increased price of their automobiles.

Pre-enforcement Review Game 1

Assumptions: Appeal stays enforcement
Compliance costs = 5 for each time period
Sole complier loses additional 2 in market share

		Chrysler (others)	
		Comply	Not Comply
G.M.	Comply	-5, -5	-7, 0
	Not Comply	0, -7	0, 0

Payoff (G.M., Chrysler or others)

Looking at the two by two game set out in the table it is not hard to see where G.M. and Chrysler (which is a placeholder for the other members of the industry) will end up. No one will comply. The lower right hand quadrant is what is called a "dominant strategy" for each player. This is the action that each player will take no matter what the other player in the game does. To be sure, G.M. would prefer to be in the lower left hand quadrant and Chrysler in the upper right hand, but competitors have no reason to give each other the satisfaction of complying and losing market share when noncompliance is costless. It would appear that with preenforcement review no manufacturer would ever comply prior to the compliance deadline. Presumably they would always seek judicial review because suit at least delays, and may eliminate, the need to comply.

But Will They Sue? The assumption that manufacturers will always sue, however, is unrealistic. To be sure it is always in a manufacturer's interest for someone to sue, but it is in the interest of each manufacturer not to be the manufacturer who does sue. If someone else sues, all manufacturers get the benefit of the litigation (assuming it is carried out competently), and only those who join the litigation as parties will have to pay for it. This is a classic "free rider" problem in which everyone wants to free ride on somebody else's effort.[118] In some circumstances the free rider aspect of the situation will mean that no one will sue. How likely are we to see that result?

The answer is not very likely, and for a number of reasons. First, this free rider problem can be solved by creating an industry association that will bring suit on behalf of everyone. If there is a precommitment to the association sufficient to give it litigating funds the free rider issue is solved. Also, in industries like the automobile industry where there are few manufacturers and top executives are well-known to each other, there are significant social (and perhaps ultimately economic) costs to welching on one's fair share of expenses necessary to promote the "common good" of the industry. Finally, even in the absence of an effective association or small numbers the likelihood of suit is quite high. We can see this by looking at the Who Will Sue game. Here we have kept the compliance cost equal to five and added an assumption concerning litigation costs, that is, that they would be at most 20 percent of compliance costs. In addition we have assumed that the probability is .5 that the rule will be held invalid. Recent experience suggests that this is not an unrealistic probability.

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[118] Here the basic arguments parallel MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 53-65 (1971).

Who Will Sue Game

Assumptions: Preenforcement review with stay of enforcement
Compliance costs = 5
Litigation costs = 1
Probability rule invalid on preenforcement review = .5
Probability of evading enforcement = .1

		Chrysler (others)	
		Sue	Not Sue
G.M.	Sue	1.5, 1.5	1.5, 3.5
	Not Sue	3.5, 1.5	-3.6, -3.6

Payoff (G.M., Chrysler, or others)

The logic of the payoffs in the table is just this: If a manufacturer sues, it will pay litigation costs of one but will avoid compliance costs of 2.5, that is, compliance costs of five multiplied by the probability that the rule will be held invalid. Hence, the total payoff from immediate suit is 1.5. Obviously, the manufacturer is better off if someone else sues, but it does not. In that scenario it gets the 2.5 avoidance of compliance costs without paying the litigation costs. If nobody sues the payoff for everybody is -3.6. No one incurs any litigation costs but no compliance costs are avoided.[119]

Given this set of payoffs the outcome of the game is indeterminate but the probability of suit is quite high. No player has a dominant strategy. G.M. would like not to sue if Chrysler is going to sue, but G.M. does not know whether Chrysler will; and vice versa for Chrysler. The situation is rather like the infamous teenage game of "chicken." G.M. and Chrysler would like to bluff each other into suing while not suing themselves. However, given that each is better off if it sues than it would be if no one sues, it is rational to chicken out and bring suit yourself. But, in order to maintain credibility or "face" for future bluffs there is also some possibility that neither will sue even though it would be individually rational for them to do so.

There is, however, a mathematical equilibrium to the game. Indeed, there are three. If one or the other sues, then its competitor need not. We end up in either the lower left or upper right hand boxes. These are stable positions once reached; neither player could individually change its mind and make itself better off. Of course, both could sue out of solidarity, precommitment or stupidity, but this is not a stable equilibrium because either could withdraw and make itself better off. Because both parties know all this ex ante, the best strategy for each player, i.e., the strategy that has the highest expected value, is a randomized approach that has each manufacturer sometimes suing and sometimes not. Whether a party sues or not does not have to be "random" in the statistical sense so long as it is not predictable by the other party. It is also possible to calculate the probability that someone will bring suit. The probability is quite high—96 percent.[120]

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[119] It is, of course, possible that no one will comply and that the agency will lose an enforcement action. Using the probability of success in an enforcement action employed in the "comply or sue calculation," *infra* at 409-410, the payoff would be -3.6 (i.e., (-5 + 1) x .9 = -3.6).

The incentives created by immediate preenforcement review of rules are fairly straightforward. If there are no penalties for noncompliance, it is in no one's interest to comply. And, even with a free rider problem, the chances are extremely high that litigation will ensue.

Looking at these games and the incentives that they create for the parties, we should not be surprised that there is an extremely high rate of litigation against federal agency regulations that can be reviewed prior to their enforcement. That the rate does not reach 100 percent suggests only that there are some other forces at work here that are not captured by the games that we have thus far defined. Manufacturers might be disinclined to sue when the returns are small, thus hoping to induce cooperative behavior from the Government in the future. Or, as we noted earlier, they may get returns to "good citizenship" that dissuade them from compliance delays that would otherwise be economically rational. But these "cooperative" proclivities have little or nothing to do with the legal structure confronting regulated parties. The long and short of the matter is that a preenforcement review regime with no penalties for delay in compliance pending the outcome of a lawsuit creates strong incentives for litigation rather than regulatory compliance.

Thus far, of course, we have only been talking about suit by regulated parties. But beneficiaries may sue as well if they think that the rule is too weak. How should we model their possible payoffs in the preenforcement review game combined with the Who Will Sue Game? It would seem that the structure of the games beneficiaries play should be similar to that modeled for regulated parties. Beneficiaries have immediate losses from their failure to achieve greater protection by a stronger rule that gives them incentives to sue that are symmetrical to these incentives given regulated parties to avoid compliance costs. If we assume that on average benefits equal costs and that litigation is equally costly for each side, then the games are identical and we should expect a similar 96 percent probability that some beneficiary will sue if the rule is recognized as weak. And, of course, the rule could easily look both too weak to beneficiaries and too strong to regulated parties.

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[120] Let G = Prob. G.M. sues and C = Prob. that Chrysler sues. If G.M. is to be willing to mix in equilibrium, it must find the two alternatives over which it is mixing (randomizing) equally desirable; that is, its expected profit from suing, $1.5C + 1.5(1-C)$, must equal its expected profit from not suing, $3.5C + (-3.6(1-C))$. Solving this equation yields $C = .78$. By a symmetrical argument, $G = .78$ as well. Hence, the probability of at least one suit is .96 $(1-.22^2)$.

We know, of course, that the chances of suit cannot be over 100 percent. The chances that a beneficiary group or regulated party will sue must, however, approach that probability because the "review or not game" between beneficiaries and regulatees should look very much like the basic Preenforcement Review Game 1. Not challenging a "compromise" rule may be the best cooperative result, but it is not a dominant strategy if the "payoffs" to regulated and benefitted parties of overturning the rule are equivalent.

The Power of Penalties. The game-theoretic situation changes drastically if there is a penalty for noncompliance pending the determination of the validity of a rule. To put the matter slightly differently, even if there is preenforcement review there may not be a clear incentive to take advantage of it so long as the rule is fully effective and penalties accrue pending the outcome of any review proceeding. Preenforcement Review Game 2 alters the situation of Preenforcement Review Game 1 simply by adding a penalty that is sufficient to deter, that is, that exceeds the gains from noncompliance. Because compliance costs are five and market share losses from sole compliance are two, the penalty would have to be more than seven to provide a deterrent. With this structure of payoffs, the dominant strategy in the game shifts from the lower right hand corner to the upper left hand—everyone complies.

Preenforcement Review Game 2

Assumptions:
Appeal does not stay enforcement
Compliance = 5
Market share loss from sole compliance = 2
Penalty = 8

		Chrysler (others)	
		Comply	Not Comply
G.M.	Comply	-5, -5	-7, -8
	Not Comply	-8, -7	-8, -8

Payoff (G.M., Chrysler, or others)

But once again, this game is too simple. First, it is not certain that the penalty will be incurred. After all, the rule might be declared invalid and no penalty would be due. At the very least we need to modify the game to reflect the probabilities of success on appeal. Moreover, success on appeal in this game may be more complicated than the situation described in the Who Will Sue Game. It seems likely, given the payoffs in Preenforcement Review Game 2, that some member of the industry will comply rather than sue. And, in the face of compliance, a substantial number of legal arguments concerning the validity of the rule will lose credibility. Many attacks on agency regulations are based on their "unreasonableness," and by "unreasonable" or "arbitrary" the affected parties often mean that the rule requires conduct that is technically infeasible or unreasonably costly. Neither of those grounds will be very plausible to a reviewing court in the face of compliance by one of the regulated parties. Hence, the probability of success changes if someone complies. The question of whether to comply or sue becomes a more complex, probabilistic issue.

The Comply or Sue Calculation. The simplest way to illustrate the situation facing a member of the regulated industry where there is no preenforcement review, or where such review does not toll the accrual of penalties, is by a "decision tree." The assumptions underlying this decision tree build on our prior ones. Once again the assumptions are arbitrary, but hopefully not unreasonable.

The idea of the decision tree is simply to trace out all the possible alternative actions that are available to a player, calculate the expected value of each alternative action, and then see what the total expected value is of a decision to act in a particular way, here either to sue or to comply. We assume in this decision tree that the actor, "G.M." cannot know at the time that it makes a decision to comply or to sue whether it will be successful in its suit or whether some other party may comply in the meantime. Because the actor has no information about the other party's decisions, it simply views the probability that someone else will comply as a chance probability, or .5. Hence, Chrysler, which is the first mover in this game, may comply or not comply with a probability of .5 for each action. If Chrysler complies, then the probabilities are .9 that the rule will be held valid and .1 that it will be held invalid. But on the branch of the tree where Chrysler does not comply, the probabilities of either validity or invalidity are .5. The task then is simply to trace out the values for each branch of G.M.'s possible actions. G.M. can decide only to comply or to sue, but it will be doing so in one of four different worlds. Which world will obtain is currently unknown to it.

Comply or Sue Calculation with no Preenforcement Review

Assumptions:
Compliance Costs = 5
Litigation Costs = 1
Probability Invalid = .5 w/no compliance
Probability Invalid = .1 w/compliance by others
Probability anyone comply = .5
Penalty = 8

-5 x .45 = - 2.25
-9 x .45 = - 4.05
-5 x .05 = - .25
-1 x .05 = - .05
= .20
Total value sue = -5.05

+5 x .05 = .25
Total value comply = - 5.00

- 5 x .75 = - 1.25
-19 x .25 = - 2.25
- 5 x .25 = - 1.25
- 1 x .25 = - .25
= 1.00
+5 x .25 = 1.25

To see how the computation has been done, consider the top branch. There, G.M. decides to comply and the expected value of this decision is its actual cost or benefit (here, minus 5 in compliance costs) times the probability that that state of the world is in fact the one in which Chrysler is complying. To get the probability for that state of the world one takes the probability that Chrysler has complied (.5) times the probability that the rule will be valid given that Chrysler has complied (.9) and multiples that fraction times the compliance costs. In the branch that is second from the top the probabilities remain the same because it is sill the comply/valid world but the payoffs are modified to reflect the fact that in this state of the world G.M. would lose the lawsuit incurring penalty costs of 8 and litigation costs of 1. The only situation in which there are positive returns from any action is when G.M. sues and the rule is held invalid. In those circumstances it pays the cost of litigation (-1) but it gains by foregoing the costs of compliance (+5).

When all the values are multiplied by the probability that that action is taken in a particular state of the world one can then total up the expected value of suing and the expected value of complying. Given the total values that emerge from this particular decision tree, G.M. would be almost indifferent as between suing or complying. A slight change in the values that are plugged into the decision tree would shift the balance in one direction or another. The decision tree thus teaches several important lessons. First, once again, it illustrates that without a penalty for noncompliance the balance of the benefits or costs from litigating or complying will strongly favor litigation. For here the question is close even with penalties. But second, it does not follow that putting a penalty into the system ensures that no one will ever challenge agency action. Indeed, even with a penalty that is greater than the sum of compliance costs and market share losses, an actor whose disbenefits from compliance were only slightly greater than those we have assigned G.M. in this example would still find it rational to bring suit or, what is the same thing, to fail to comply and resist enforcement by raising the potential invalidity of the rule as a defense.

But there is a third lesson here that has been implicit in the whole analysis and that should now be brought front and center: To the extent that judicial review is a contributing factor in "ossifying" the rulemaking process, that problem may not lie in the conventional direction most often debated, that is, the relative stringency of the standard or scope of review. Judicial stringency is but one factor bearing on the likelihood of success in appealing a rule and on the payoffs to appeal versus compliance. The timing of review and the conditions on its availability also shape that calculation as does the level of compliance cost. There are potentially a large number of policy options here for recalibrating the game so that it has an "appropriate" or "balanced" set of incentives.[121]

B. Evaluating Policies

Assume for the moment that we believe the charge that judicial review debilitates rulemaking in roughly the ways that prior researchers have described. What policy levers would we like to pull to rectify the situation—remembering all the while that judicial review is a good as well as a bad; that in addition to inducing error, aggravating obstructionism, and demoralizing policymakers, judicial review may also protect against unfairness, irrationality and nonaccountability.

Attacking "Scope" or "Stringency" Problems. Lawyers argue interminably over the appropriate scope of judicial review of agency action.[122] Congress has many times attempted to modulate the stringency of judicial review by changing the verbal formulae on scope of review. Contrary to the APA formulation, "substantial evidence" review was made part of the review provisions for informal rulemaking in a number of the newer regulatory agencies.[123] And, a completely different formulation from those found in the Administrative Procedure Act was utilized when judicial review was made available for Veterans claims.[124] In at least some cases, the famous *Universal Camera*[125] case is perhaps the premier example, the courts have believed that legislative reformulation of the review standard was telling them something important about the political branches' expectations concerning the scope of judicial surveillance of agency decisionmaking.

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[121] Some sort of "penalty" or "bonding" mechanism might also be made applicable to beneficiary suits in order to shift the calculus there.

[122] The recent outpouring of articles concerning the *Chevron* case is illustrative. The loss of forests necessary to make the paper to print all of the articles written on the proper standard of review in interpreting statutes following this case might well have justified requiring the Supreme Court to issue an environmental impact statement along with the opinion. *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Maureen B. Callahan, *Must Federal Courts Defer to*

Yet, some commentators would argue that it is unclear whether "arbitrary and capricious" actually means anything different than "substantial evidence."[126] And, where some find the general tenor of judicial review reveals continuing, if episodic "hard looks,"[127] others see "soft glances"[128] or some other metaphoric

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Agency Interpretations of Statutes? A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275; Gary J. Edles, *Has Steelworkers Burst Chevron's Bubble? Some Practical Implications of Judicial Deference*, 10 REV. LITIG. 695 (1991); Cass R. Sunstein, Law and Administration After Chevron, 90 COLUM. L. REV. 2071 (1990); Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 COLUM. L. REV. 986 (1987); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986).

[123] The Occupational Safety and Health Act, 29 USC §651 et seq. and the Consumer Product Safety Act, 15 USC §2051 et seq., are prominent examples. It is hardly clear what Congress had in mind in applying the substantial evidence rule to informal proceedings. It was perhaps merely a compromise between those who supported the bills, along with their logical corollary of informal rulemaking subject only to review for "arbitrariness," and those who opposed the legislation and wanted at least to hamper its effectiveness through the use of formal procedures for rulemaking that would actuate the "substantial evidence" rule under the APA. The judges who had to deal with this compromise were not pleased. *See* Industrial Union Department AFL-CIO v. Hodgson, 499 F.2d 467, 469 (D.C. Cir. 1974), where Judge McGowan lamented that "the federal courts . . . surely have some claim to be spared additional burdens deriving from the illogic of legislative compromise."

[124] Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105, Div. A (1988) (to be codified at 38 USC §101).

[125] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[126] Scalia and Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. REV. 899, 934 (1973).

[127] Pierce, supra note 122.

[128] Glicksman and Shroeder, *supra* note 56, for example, claim that there is a recent trend toward deference with respect to EPA decisionmaking. A small but statistically significant trend toward deference was identified by Schuck and Elliott immediately following the *Chevron* decision. *See* Schuck and Elliott, *supra* note 69. But, the deference may not hold up our time, particularly since the Supreme Court arguably has been less deferential in practice, whatever its pronouncements, post-*Chevron* than immediately prior to *Chevron*. *See* Cohen and Spitzer, *Solving The Chevron Puzzle*, 57 L. & CONTEMP. PROBS. 65 (1994).

judicial posture as the new trend. Meanwhile, some of our most experienced judges have told us that how hard they look at any particular agency's determinations depends on a whole host of historical and contextual factors that outrun legislative formulation.[129] There thus seems much wisdom in John Mendeloff's previously quoted suggestion that the real question in any review proceeding is reasonableness "and that reasonableness lies in the eyes of the beholder."

Do not overread the argument here. It would certainly make a difference in the judicial review game to change the probabilities of success in one way or another. The payoffs in the game are highly contingent upon those probabilities. Yet it seems a virtually forlorn hope that we might reduce the uncertainties that drive the adversary litigation process by working hard on the question of the scope or stringency of judicial review. Legislative language might put a spin on the process. But, given the other contextual factors that influence the scope of judicial review, even that spin might not be very long lasting.

Moreover, we know from the literature on civil litigation[130] that the number of suits brought to trial is a function, not of the standard for judgment, but of the degree to which plaintiffs and defendants similarly assess the "stakes" in the lawsuit and plaintiff's likelihood of success, i.e., the expected value of going to trial. Given the multitude of issues available to be litigated in almost any rulemaking preenforcement review proceeding and the vagueness of any applicable review standard, the chances that regulated parties, beneficiaries and the government will differentially assess the likelihood of a successful review seems high. In addition, all these "players" are "repeat players" so that the "stakes" may be different for each, leading to different expected values of litigation even when probability estimates concerning a plaintiff's success are identical. In short, "settlement" of preenforcement review proceedings seems deeply problematic.

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[129] Here one is reminded of Judge Harold Leventhal's suggestion in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970), cert. denied 403 U.S. 923 (1971) that courts reviewing agency actions are looking for some "combination of danger signals" that might justify close scrutiny and perhaps a reversal or a remand. In his view, the review function: "Combines judicial supervision with a salutary principal of judicial restraint, an awareness that agencies and courts together constitute a "partnership" in the furtherance of the public interest and are "collaborative instrumentalities of justice." These sentiments are echoed in the Attorney General's committee in administrative procedure, administrative procedure and government agencies, Senate Doc. No. 8, 77 Cong., 1st Sess. 75-76 (1941).

The difficulty of combining deference and skepticism in the proportions that Congress intended through some verbal formulation of the scope of judicial review was put in rather exasperated form by Judge Brown in American Petroleum Institute v. EPA, 661 F.2d 340, 349 (5th Cir. 1981): In summary, we must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, but only so far and no further; and its discretion need not be ideal or even, perhaps, correct so long as not "arbitrary" or "capricious." . . .

[130] George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.C. L. REV. 527 (1989); George L. Priest & Richard Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

There is the additional concern that attempts to reduce the intrusiveness of judicial surveillance, by telling judges to be more respectful of administrative discretion, is neither politically popular, nor constitutionally appropriate. To the extent that the Congress has seriously debated any general change in the scope of judicial review of rulemaking it has largely been changes in the opposite direction. The many versions of "Bumpers"[131] and the fall of that last significant bastion of nonreviewability—VA claims—all tell the same story. As a nation we are committed to judicial control of agency action. Telling the courts to lay off may be a political nonstarter, even if we believed that altered verbal formulae were efficacious or appropriate.[132]

Changing the Stakes. The preceding game-theoretic models, however arbitrary their quantitative assumptions, also demonstrate quite graphically how changing the stakes in the game matters. Almost no better engine for promoting litigation rather than compliance can be imagined than a scheme that permits immediate review while avoiding all compliance and penalty costs. For, while lawyers and litigation are expensive, most major rulemaking proceedings involve issues of such importance to at least some firms or individuals that the compliance burden imposed will, or potential benefits foregone, dwarf the expected costs of litigation.

There might, therefore, be much wisdom in John Mendeloff's further suggestion that trench warfare in the rulemaking process might be avoided by systematic attempts to ease compliance burdens. (He is particularly critical of the OSHA statute that seems to leave the administrator no choice but to impose extremely costly regulatory requirements.) There are obviously many ways to reduce compliance burdens. Lengthening time periods for compliance tends to reduce costs, as do less stringent or less broadly applicable standards. Market-like devices for trading among regulated parties to minimize overall compliance costs also have much to recommend them. Yet, this "reduce the stakes" strategy has some severe problems. One is that it seems to argue that the solution to the problem of too little rulemaking is to do less, or less of significance. In many cases reducing the stakes is a strategy for solving a problem by surrendering to it.[133]

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[131] For a discussion of successive versions of the Bumpers Amendment and its rationale *see, e.g.*, McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1162-68 (1977). In its original version, S. 86, 95th Cong. 1st Sess, 123 Cong. Rec. 639 (1977), the Amendment called for the elimination of any presumption that the rule or regulation of an agency was valid and required courts to invalidate rules unless supported by "clear and convincing" evidence.

[132] On the other hand, as we will suggest later, *see infra* at 432-434, some attempt to have the courts reduce their role in agency policy choice may be the linchpin of a strategy for deossifying the rulemaking process. In some sense, the Supreme Court seems to have been doing just that, although the lower courts are not necessarily getting the message. *See, e.g.*, Richard Thomas, *Prosecutorial Discretion and Agency Self-Regulation*, 44 AD. L. REV. 131 (1992). And, the Supreme Court itself has hardly been consistent in this matter. *See, e.g.*, J. MASHAW, R. MERRILL & P. SHANE, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 719-37 (3RD ED. 1992). *See* also, Merrill, *supra* note 122; Cohen & Spitzer, *supra* note 128.

There is, however, a deeper difficulty. Mendeloff's argument and the stylized game structures that have been portrayed here, both tend to assume homogenous compliance costs. The clear fact of the matter, however, is that regulation disfavors (or benefits) some parties more than others.[134] Indeed, for some parties compliance costs may not be "costs," if by that we mean deadweight losses. Sometimes they are investments in future profitability. General Motors did not join with its American automotive competitor/colleagues in attacking the original passive restraints rule, for example, because it held the patents on the airbag technology and expected to reap significant competitive advantage from the regulation. It later waged religious warfare against the National Highway Traffic Safety Administration over that same rule in part because the agency's vacillating prescriptions (through no particular fault of its own) denied G.M. some very handsome profits.

The differential costs of compliance have particular relevance to deregulatory rulemaking. Existing regulations may have radically different effects within industries and their removal will benefit some parts of an industry more than others. Hence, reducing the stakes would have to mean something more than simply reducing regulatory burdens in order to have a significant impact on the use of legal process to wage regulatory warfare. The Investment Company Institute, for example, is surely one of the most litigious trade associations ever formed. Yet its efforts in the judicial arena are more often directed at maintaining regulatory burdens on financial intermediaries outside the scope of its membership list than at fighting battles for a freer market.[135]

Thus, policies that attempt to reduce adversarial obstructionism by reducing the stakes in regulation might virtually have to mimic legislative log rolling. In order to ensure nonadversariness, agencies would really be looking for rules or rule relaxations that "fairly" distributed the benefits and costs over all the affected interests, including various classes of regulatory beneficiaries. In this guise, the proposal begins to look either like agency surrender (or "capture") or, more optimistically, a proposal for regulatory negotiation. And, while "reg neg" clearly has its place, no one believes that most of the far-flung rulemaking activities of the federal bureaucracy can be reshaped into a negotiating format.[136]

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[133] And surrender may not work, as the recent removal of OSHA's very watered-down toxic exposures rule demonstrates. 29 CFR §1910 (1989). *See also* my critique of Mendeloff. Jerry Mashaw, Book Review, "The Dilemma of Toxic Substance Regulation," 19 RAND J. OF ECON. 486 (1988). *See* also Sidney A. Shapiro & Thomas O. McGarity, *Not so Paradoxical: The Rationale for Technology-Based Regulation,* 1991 DUKE L.J. 729.

[134] B. Owen & R. Braeutigam, The Regulation Game: Strategic Use of the Administrative Process (1978); Jerry Mashaw, Book Review, *supra*, note 133.

[135] *See, e.g.*, Board of Governors of the Federal Reserve System v. Investment Company Institute, 450 U.S. 46 (1981); Investment Company Institute v. Camp, 401 U.S. 617 (1971); Investment Company Institute v. FDIC, 815 F.2d 1540 (D.C. Cir.), cert. denied, 484 U.S. 847 (1987); Investment Company Institute v. Conover, 790 F.2d 925 (D.C. Cir.), cert. denied, 479 U.S. 939 (1986).

We surely should be concerned about the imbalance in the stakes that results from significant discontinuities in the burdens of complying and litigating. But, given the differential benefits and burdens born by regulated parties, or by the potential beneficiaries of regulations that have been delayed or repealed, it will not be easy to design systems that place the right amount of weight on one or another side of the scales. Incentives for legal combat seem ubiquitous whether rulemakers are regulating, deregulating, or not regulating.

Timing. Looking at the timing of judicial review is in some sense just another way of stating the stakes problem. The modern penchant for immediate preenforcement review will often mean that regulated or deregulated parties can choose between litigation and compliance at a time when the litigation alternative is relatively costless. Regulations often have lead times that extend well beyond the point at which an appeal would predictably be concluded and stays of the effective date of a rulemaking action may be available to protect parties against potentially wasteful compliance efforts in the interim. Yet a concentration on timing as a discrete issue may suggest problems and reform opportunities that would otherwise be missed.

In certain circumstances, for example, the timing of review has complex interactions with the probabilities for a successful appeal. If the availability of immediate review eliminates the incentives of all parties to begin compliance efforts, then it also eliminates the incentives that might otherwise exist to solve some of the feasibility and practicability issues that may loom large in the litigation. Time and again National Highway Traffic Safety Administration regulations foundered on the shoals of practicability or reasonableness. Yet, over time, it became clear that many of the technological problems that convinced courts to remand rules to the agency could be solved. Moreover, they might have been solved much earlier had attempts at compliance preceded resort to the judiciary.[137]

The timing of review also radically reshapes the focus of litigation. Review in an enforcement context often concentrates on one or a few issues of particular moment to a particular firm. Preenforcement review invites, and usually produces, the invocation of a laundry list of potential frailties in a rule's substantive content or procedural regularity. The multiplicity of issues available, combined with the unavailability of evidence concerning genuine attempts to comply with the rule, dramatically increase the uncertainties of judicial review.

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[136] *See generally* Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986); Frederick R. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261; Neil Eisner, *Regulatory Negotiation: A Real World Experience*, 31 FED. B. NEWS J. 371 (1984); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise?* 71 GEO. L.J. (1982).

[137] *See* Mashaw and Harfst, *supra* note 3 at 87-103.

Paul Verkuil warned us about the shift in the quality of review that would likely result from shifts in timing almost 20 years ago.[138] In Verkuil's words

> The consequence of the early preenforcement review of rules in the Courts of Appeal is a new focus on rulemaking that, it is believed, will contribute to the creation of a new rulemaking model. In the past, when a rule was reviewable only after enforcement, considerable time could elapse before the rulemaking procedures and the factual basis for the rule were tested. As a result, review of the circumstances surrounding the rule's enactment was secondary and somewhat obscured by time; the main issue was the rule's application to the particular respondent before the Court. But, with final order requirements tied more closely to notions of finality and ripeness rulemaking review can take place almost instantly, and the focus on rulemaking process may be much sharper. In this sense, early review means closer review, which itself leads to a vigorous judicial scrutiny of the rulemaking model.[139]

The critical insight in Verkuil's analysis is his location of the focal point of judicial interest as the "model" of agency rulemaking. Much later Mashaw and Harfst dubbed this approach "proceduralized rationality review." Rather than take on the Lochnerian task of substantive rationality review, the courts have "proceduralized" the issues as questions of the adequacy of the agency's explanation; or its responsiveness to objections raised by the rule's opponents; or the adequacy of the "notice" afforded parties, who claim that they would have responded differently had they but known the agency's true plans, or the facts or "methodologies" that it intended to rely upon.[140] The irony, of course, is that these attempts at avoiding judicial intrusion on administrative agencies' substantive judgments may have produced uncertainties and "defensive" rulemaking that have contributed much to its "ossification."

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[138] Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

[139] *Id.* at 204.

[140] *See, e.g.*, United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240 (2d Cir. 1977) (remanding FDA smoked fish regulation for failure to reveal scientific methodology underlying its proposals in notice of proposed rulemakings).

All of this suggests that there may be something more to the notion of changing the timing of review than merely its potential strategic significance in shifting incentives toward compliance rather than litigation. It has some "appropriateness" advantages over attempts to alter the scope of review toward soft glances or, even more ambitiously, to reintroduce "nonreviewability" of policy choices as a serious option.[141] To deny immediate review is not to deny review totally. The traditional individual "right" to independent judicial judgment is preserved. Timing also seems more amenable to legislative control than does an attempt to alter scope by revised verbal formulae. In addition, review at the application stage tends to ameliorate the "political" aspects of review (the sense that it is little more than a policy dispute fueled by competitive rent-seeking) while simultaneously focusing issues and providing a better information base. "Enforcement" or "implementation" review thus puts the judiciary in a better position to defend its judgments against claims of either incompetence or "political" interference.

There are surely problems with this approach to reform. First, recent developments in congressional legislation and judicial lawmaking have tended almost uniformly in the opposite direction.[142] Preenforcement review has been the norm, and with increasing frequency later review in enforcement proceedings has been barred.[143] The congressional impulse has been to provide an opportunity for quick resolution of claims of invalidity on the theory that legal certainty would benefit both the agency and affected interests.

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[141] The Supreme Court attempted to deal with this general class of problem in Chevron (Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)) by instructing lower courts to respect agency interpretations of statutes that in effect delegate interpretive authority to agency decisionmakers. But the Chevron solution is both incomplete and unstable. There is no formula for determining when interpretive authority has been delegated and commentators have rightly protested the bald recognition of a virtually unreviewable power in administrators to interpret their own statutes—whatever the historic, deferential realities of agency-court partnership in this regard. Cynthia R. Farina, *Getting From Here to There*, 1991 DUKE L.J. 689; *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071 (1990). Much of our trust in the "rule of law" in administration hinges on a belief that administrators act under law as interpreted finally by an independent judiciary. Hence, the Court itself has been ambivalent, if not simply inconsistent, in applying the Chevron principle and the circuit courts can hardly do better. (*See* discussion at J. Mashaw, R. Merrill & P. Shane, *supra* note 132).

There is also the usual difficulty of characterizing what form a legal issue takes. Many have thought that the Supreme Court's *State Farm* opinion was at loggerheads with its Chevron analysis. The first suggests a "hard look" while the second favors a "soft glance." There is, of course, a technical distinction between the way in which the issues were posed in the two cases. (Indeed, a distinction that suggests to some that the results are backwards, not just inconsistent.) The State Farm attack was on the rationality of the NHTSA regulation, thus calling into question its factual predicate and regulatory explanation. The question could have been recharacterized, however, as a question of the interpretation of the Motor Vehicle Safety Act. And, under a statute that simply directs the administrator to "meet the need for automobile safety" by regulating "unreasonable risks," it would be child's play to make a persuasive argument that the administrator had been delegated the authority to make essentially political judgments about what risks were to be regulated, when, and through what methods. (Peter Strauss has, nevertheless, argued persuasively that *Chevron* and *State Farm* are consistent from a deeper, institutional perspective. *See*, Strauss, One Hundred Fifty Cases a Year (cite)). The inherent difficulty of determining whether the issue is one of statutory interpretation or regulatory reasonableness obviously further confounds any attempt to "regulate" the scope of review that will be exercised.

But inattention to the way in which this resolution of the timing issue shapes the incentives for litigation may have produced perverse results. Not only has the resolution of controversy not been particularly swift, many resolutions may have been unnecessary and the usual disposition, remand, produces uncertainty plus delay. A period of attempted compliance, experimentation and negotiation between the agency and affected parties, induced by the unavailability of immediate review, might well produce better rules, swifter compliance, and less litigation. Moving back toward the older regime of rulemaking review primarily at the time of enforcement thus has much to recommend it. For unnecessary judicial review simultaneously stultifies the policy process while imperiling judicial and administrative legitimacy.[144]

Yet, second, we must be careful about the generality of such conclusions. While preenforcement review may have been particularly dysfunctional in the context of standard setting at the National Highway Traffic Safety Administration, it may be extremely important to permit preenforcement review elsewhere, for example, of EPA air quality standards. Those regulations set goals that are implemented through a complex state-federal process and that may demand legal certainty in order to mobilize political resources, whatever the costs in legal adversariness. Nor does preenforcement review structure compliance/litigation incentives in the same fashion in other programs. Changes in FERC or SEC accounting rules can be implemented with very short lead times. Here the option to litigate rather than to comply is sharply constrained, absent a stay[145] of the rule pending the judicial outcome. In other programs affected parties may find almost any rule providing legal certainty preferable to an unstructured licensing or prosecutorial system. Hence, the prospect of unbalanced incentives to litigate rather than to comply is much less prominent. Moreover, as respects deregulatory rulemaking, there may be little choice but to view the rule as either ripe for review when issued or effectively nonreviewable.

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[142] An impressive catalogue of legislative preenforcement review provisions was provided almost a decade ago in Frederick Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 DUKE L. J. 279 (1981). The Davis catalogue was incomplete at the time and numerous preenforcement review provisions have been passed or amended since.

[143] The 1972 Amendments to the Federal Water Pollution Control Act are typical. 86 Stat. 891, §§ 509(b)(1) and (2), codified at 33 USC §1369(b)(1) and (2) (1982 and Supp. 1991). They set a short deadline (90-120 days) from promulgation within which a rule may be challenged. Further challenge may be based only on grounds that arose after the prescriptive period and review in any civil or criminal proceeding for enforcement is explicitly prohibited.

[144] There is, of course, also the prospect that the leverage of delayed review will permit agencies to impose costly and unreasonable regulations on industry or deny beneficiaries the promise of regulatory legislation.

[145] The foregoing analysis suggests, at the very least, that judges should be very cautious about granting such stays—the obvious cost of compliance with invalid rules to the contrary notwithstanding.

An additional difficulty with attempts to modulate the timing of judicial review is that timing is not just a function of congressional policy. The *Abbot Laboratories* case was the culmination of a rather long line of Supreme Court jurisprudence that reinterpreted the provisions of both the Administrative Procedure Act and other generic legislation to permit preenforcement review.[146]

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[146] Prior to the *Abbott Laboratories* case and to the rise of rulemaking as a preferred form of policymaking in both new and old agencies, the customary provisions for judicial review of agency action authorized, but also limited, judicial review to "final orders" of the agency. This sort of language was used as early as the Communications Act of 1934, 47 USC §402(a) (added in 1934, 48 Stat. 1093) and was made applicable to a number of agencies pursuant to the Administrative Order's Review Act (known as the Hobb's Act), 64 Stat. 1129 (1950), recodified by 80 Stat. 621 (1966 at 28 USC §§2341-2352 (1978 and 1992 supp.). So long as virtually all "orders" were either adjudications, licensing decisions, or rate orders, the question of whether general policymaking rules could be immediately reviewed never arose.

The first major step toward preenforcement review of policy rules was made by the Supreme Court in Columbia Broadcasting System v. United States, 316 U.S. 407 (1942). Having promulgated chain broadcasting rules in a proceeding involving all the major networks, (to that degree this particular "rulemaking" was rather similar to a multi-party adjudication), the Federal Communications Commission claimed that the rules adopted could not be challenged until applied in an enforcement proceeding. Recognizing that the broadcasters would be virtually certain to conform their conduct to the regulations to avoid the unpleasant legal consequences of noncompliance, the Supreme Court informed the Federal Communications Commission that it had to take the bitter with the sweet:

> Instead of proclaiming general regulations applicable to all licensees, in advance of any specific contest over a license, it might have awaited such a contest to declare that the policy which these regulations embody represents its concept of the public interest. As a matter of sound administrative practice, both the rulemaking proceeding and the specific license proceeding undoubtedly have much to recommend them. But they are by no means the same, nor do they necessarily give rise to the same kind of judicial review. Having adopted this order under its rulemaking power, the Commission cannot insist that the appellant be relegated to that judicial review which would be exclusively if the rulemaking power had never been executed.

The notion that rules might be reviewed immediately, and exclusively in that form, was given the Supreme Court's imprimatur in the famous *Yakus* case, Yakus v. United States, 321 U.S. 414 (1944), decided under the Emergency Price Control Act of 1942. Under that statute, the administrator could promulgate price ceilings which were reviewable in an Emergency Court of Appeals within 60 days of their promulgation. The statute also made that route of review exclusive. The Supreme Court upheld this provision in the face of a due process challenge to a criminal prosecution of a meat wholesaler who had failed to seek review of the administrator's price ceilings within the statutory 60-day time limit.

The courts, however, did not immediately move to the proposition that all rules were "final orders" and therefore reviewable under the conventional statutory language of the New Deal and immediately post-New Deal period. *See, e.g.*, United Gas Pipeline v. Federal Power Commission, 181 F.2d 796 (D.C. Cir. 1950). Nevertheless, in Frozen Foods Express v. United States, 351 U.S. 40 (1956) and U.S. v. Storer Broadcasting Company, 351 U.S. 192 (1956) the Supreme Court made clear that it would view rules as "final orders" whenever they had the present effect of requiring complaining parties to change their conduct or bear the legal consequences of noncompliance. The Abbott Laboratories case (Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)) along with its companion cases were important primarily in extending

Later congressional statutes that provide for preenforcement review of the rulemaking efforts of specific agencies might be viewed as an effort by Congress to regulate the availability of preenforcement review rather than a legislative attempt to broaden and deepen the Supreme Court's initiative. At the very least preenforcement review of rules should not be seen as a legislative demand forced upon an unwilling judiciary.

If preenforcement review of agency rulemaking is both legislatively and judicially entrenched, yet debilitating to the rulemaking process, what is to be done? I am far from certain, but Carl Auerbach had some ideas back in the mid-1970s that might bear reinvestigation.[147] Auerbach was particularly concerned with the way in which judicial review was focusing more and more on the rulemaking "record." For one thing focusing on the agency record as the exclusive basis of review seemed to fly in the face of the original intent of the APA. In the language of the Attorney General's Manual:

> The APA does not require the formulation of rules upon the exclusive basis of any record made in any formal rule proceedings. The agency is free to formulate rules upon the basis of the materials in its files and the knowledge and experience of the agency, in addition to the materials it used in public rule-making proceedings. It is not required to disclose the materials in its files or the knowledge and experience on which it based the rules, either prior to its promulgation or in the concise general statement of its basis and purpose.[148]

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these principles to a situation in which the legal risks from noncompliance were less draconian than the loss of a license or certificate without which the firm could not do business.

The liberalization of ripeness doctrine implicit in *Abbott Labs*, however, has had a double effect. First, it has tended to read liberal ripeness doctrine back into the older statutes that spoke to the review of "final orders" and that were drafted in an era populated largely by adjudicatory, licensing or rate setting orders. Second, Abbott has also set a tone for the interpretation of modern preenforcement review statutes that speak directly to general rules of policy, thereby all but foreclosing the question of whether ripeness is still a significant issue under a statute making an agency's rule immediately reviewable. Although Judge, now Justice Scalia, once authored an opinion holding that ripeness issues were as pertinent under specific statutory review provisions as they had been in "non statutory review" in the *Abbott Labs* context (Air New Zealand Limited v. CAB, 726 F.2d 832 (D.C. Cir. 1984), it is hard to find that sentiment echoed elsewhere in the jurisprudence. Indeed, the D.C. Circuit has warned litigants not even to make their own judgments about the ripeness of claims subject to review under the now standard form of preenforcement review statute, lest they find that their claims were barred by the statutes' preenforcement time limits. Eagle Picture Industries v. EPA, 759 F.2d 905 (D.C. Cir. 1985).

[147] Auerbach, *Informal Rulemaking: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 M.U.L. REV. 15 (1977).

[148] U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1947).

In Auerbach's view this original conception assumed that courts of appeals would review rules only after an administrative law judge or a trial court had created a record appropriate for appellate review in the context of an enforcement proceeding. And, he recognized that it was preenforcement review that had brought the status quo of judicial review so far afield from the original APA intent. But Auerbach's concerns were not only with historical intent. He believed that the "on the record review" or "proceduralized rationality review" might well be unfair to private parties who could be precluded from raising on judicial review any objections that had not been previously put into the agency record. Auerbach, however, recognized that this unfairness could be avoided by what Mashaw and Harfst later called the "full-court press." In Auerbach's words, "participants in the proceeding will voice every possible objection and introduce data to support it."[149]

Auerbach predicted what we now find to be true—defensive adversariness produces significant delay and, arguably, the inefficient use of scarce agency resources. In his words "the new concept of on-the-record §553 proceedings will destroy the relative simplicity, flexibility and efficiency once associated with rules promulgated under §553."

Auerbach's solution to this conundrum was to create a different model of agency rulemaking that operated in two stages. The first would preserve the flexibility and legislative-type inquiry that he believed to be the basic presuppositions of APA §553. That this model might not be terribly revealing to participants about the agency's plans or factual predicate, and might therefore limit both their participation and opportunities for judicial review, was to be solved by a second stage proceeding. Under Auerbach's proposal once an agency had promulgated a rule:

> Any person seeking judicial review of a §553 rule [would] be required to file a protest against the rule at the agency. The protest would attack the validity of the regulation either as a whole or as applied to the party protesting. The agency would then conduct an on the record proceeding where all the attributes necessary to ensure fairness to the protestants and meaningful judicial review would be preserved, but limited to the specific issues raised by the protestant. The disposition of the protest would be subject to direct review on the basis of the record made in the protest proceeding.[150]

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[149] *Id.* at 60.

[150] *Id.* at 61.

The $64 question of course is whether this approach could be deployed in a way that would in practice give more focus to the critical issues and provide better evidence upon which to base either agency modifications or judicial review. If so the proposal might limit the litigiousness and uncertainty that now surrounds the whole process of proceduralized rationality review. But, his assumption that "protests" would be focused, rather than a scattergun attack on every element of the rule, may have reflected an earlier era's experience with judicial review. And, if Auerbach's model preserved the opportunity for parties to protest and seek review of rules without incurring either penalties or compliance costs, one might well wonder whether it would "deossify" rulemaking or simply add another more formalized, participatory step to the process, with its own possibilities for obstructionism and delay.

C. Games, Presidents, and Congresses

A game-theoretic approach to the political environment of rulemaking can carry forward the basic approach used in the judicial review game to deal with problems encountered in executive and legislative oversight of administrative rulemaking activity. The use of that analysis, however, should be recognized as resting on a fundamental political assumption: that in a pluralistic polity the other institutions that form the external environment of agency rulemaking respond to constituent claims in something like the same way that the judiciary responds to litigant claims. In short, the institution analyzed, whether OMB, the current Council on Competitiveness (CoC), the House, the Senate, or some legislative committee or subcommittee, is presumed to act to attempt to influence the rulemaking process only at the behest of some other person, firm, or interest group. From this perspective the political institutions are passive until called upon by others, just as we generally view the courts as passive institutions for dispute resolution.

This assumption is, of course, to some degree—sometimes to a considerable degree—false. But it is equally false to imagine that the judiciary is entirely passive with respect to the claims of outside litigants. Judicial doctrine frames the conditions under which litigants may appeal to it and the judiciary exercises considerable discretion in hearing or not hearing cases. Moreover, from the discussion that we have previously traversed, it is clear that the judiciary has institutional interests at stake—at the very least its own legitimacy as a lawgiver. Its actions respond in part to incentives built into our constitutional conception of the judicial role. Hence, viewing litigation as litigant instigated and uninfluenced by the courts, and the outcome of litigation as either a chance probability or a probability influenced solely by the existence or nonexistence of pertinent information, was also somewhat unrealistic.

After first looking at the institutions that control the political environment of rulemaking in this active-constituent passive-institutions framework, we will reconstruct the game to take into account the strategic reality of institutional competition between the executive and legislative branches. For, it is surely also the case that the agencies' nonjudicial, political controllers, must be looked at as active participants in policymaking in ways that courts seek to avoid. That analysis, while featuring a discussion of legislative versus executive power in molding rulemaking, will also show us something about the crucial importance of the way in which existing states of the world, judicial decisions, and prior agency decisions determine the outcomes of the rulemaking process.

Active Constituents—Passive Institutions. We need not here engage in any further formal constructions in order to say something about the important policy parameters that result from either what we might call the "executive coordination game" or "the legislative oversight game." We know from looking at the judicial review game that there are three important factors bearing on whether claimants or constituents have powerful incentives to attempt to actuate the influence of institutions in an agency's external environment: benefits (usually the avoidance of compliance costs or the achievement of competitive advantage), costs (in the judicial review game the out-of-pocket costs of litigation, the possibilities of paying penalties, and some subtler costs of achieving or losing future agency cooperation), and the probability of success on appeal.

One of the principal implications of this prior analysis was that the current structure of preenforcement review skews the incentives of participants fairly strongly in the direction of litigation rather than compliance. One's intuitions are likely to be that the same would be true for appeals to an executive superagency like OMB or CoC or to some part of the Congress. Most such appeals would be made prior to the adoption of a rule, much less its implementation. Moreover, since these sorts of petitions for political intervention might easily result in delay (if not derailment) of the agency's rulemaking process, benefits from delayed payment of compliance costs or the continuation of some competitive advantage from existing regulation (or its absence) should almost always be available. As a former EPA general counsel is reported to have said "anybody representing a client who did not use [the OMB] route would be damn negligent."[151]

On the other hand, one should not overstate the case. There are clear costs involved in appealing to either the executive or legislative branches that do not obtain when seeking judicial review. The first is that there are some political constraints on making these sorts of individualized appeals. Claimants before courts are presumably seeking their "rights." Persons seeking intervention by OMB or by a representative may well appear to be (or be portrayed by their opponents or the press to be) seeking quasi-corrupt, political favors; even if they avoid arguing anything save the merits of their position. Our political culture has become somewhat cynical, but cynicism is the posture of disappointed idealists. Individuals and organizations have not stopped caring about their reputations for responsible civic behavior.

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[151] McGarity, REINVENTING RATIONALITY, *supra* note 105, 289.

That the process is political rather than legal also entails a second form of cost. The firm that seeks intervention from the Council on Competitiveness, or from the home-state representative on OSHA's appropriations committee, would do so with the virtual assurance of incurring a political obligation. If the firm or individual is hesitant about owing an uncertain (and certainly undefined) political debt, he or she may be dissuaded from making the appeal. There are also direct costs to pursuing the legislative or executive option just as there are litigation costs associated with appealing to the judiciary. Given the modern tendency to make such appeals through lawyers, the direct costs may be very nearly the same.

There are opportunity costs to making political appeals as well. The constituent who constantly begs for favors may believe, and quite rightly, that it will soon be perceived as a pest. Hence, what is asked for now may limit what could be asked for in the future. This sense of the opportunity costs of appeal will have some dampening effect on the willingness to use legislative or executive levers, a consideration that may well not obtain at all with respect to litigation. The litigant is generally going before different courts, or at least different judges and different panels seeking its "rights," not favors. And a reputation for being willing to litigate may actually be a negotiating advantage.

Finally, the likelihood of a successful political appeal may be rather limited. Scandal-mongering to the contrary notwithstanding, reports on the actual effects of OMB review of agency regulations suggest that the overloaded Office of Information and Regulatory Affairs (OIRA) can pay scant attention to most rules,[152] even major ones. That someone outside OMB is importuning it to take a particularly close look at a regulation may help, but influencing OIRA's agenda may be extremely difficult.

As we noted earlier, however, a targeted approach with respect to particular agencies and important rules can have an impact. Analysts who have concentrated on OMB's relationship with the EPA find substantial intervention, considerable substantive effect and constant problems of delay.[153] Moreover, experienced participants in the rulemaking processes of agencies that have little or no fear of judicial reversal report that executive branch oversight aided and abetted by congressional analytic requirements have been sufficient to cause the virtual abandonment of rulemaking.[154]

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[152] *See* GEORGE EADS AND MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA (1984).

[153] *See* Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NA. RES. L. 2 (1984). *See also* McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987).

The extent to which OMB involvement is predicated on appeals from privileged constituencies is unclear. One does not have to look far in the environmentalist community to find those who suspect that much of OMB's interest in EPA's regulations is stimulated by potentially or already regulated industry. That OMB and other parts of the Executive Office of the President or the White House establishment act as "conduits" for ex parte representations or lobbying in informal rulemaking also shows up in litigation[155] and is vividly portrayed by the press.[156] Whatever the difficulties of using executive branch contacts to influence rulemaking, it seems clear that a skillful lobbyist can bring a large number of pieces of the executive establishment to bear on a particular rulemaking proposal and can thereby make the life of the proposing agency very complicated indeed.[157]

Playing the "political card" to delay or derail rulemaking activity is surely common on the Hill, but it too faces obstacles. The individual congressperson may often be able to do little beyond passing on the constituent's complaint to the relevant agency. Powerful committee and subcommittee chairs are, of course, differently situated and may importune the agency with greater effect.[158] Nevertheless, we have virtually no data on the degree to which congressional intervention has delayed, derailed, or substantially altered agency rulemaking. The political science literature is in sharp disagreement concerning the influence of congressional oversight on agency action.[159] The legislative veto threat is gone and while there are numerous appropriations riders sprinkled about in the Statutes at Large,[160] many seem symbolic rather than instrumental.[161] Congress' power to hassle administrators and to claim credit with constituents for intervening with the bureaucracy is legendary, but there is virtually no hard data on the degree to which this external political force is a major impediment to effective rulemaking activity.[162]

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[154] Hutt letter to Carnegie Task Force.

[155] *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

[156] *See, e.g.*, Bob Davis, What Price Safety?: Risk Analysis Measures Need for Regulation, But Its No Science, Wall Street Journal, page A1, col. 6 (Thursday, August 6, 1992).

[157] Id. at p. 84, cols., 3-5.

[158] ACKERMAN AND HASSLER, CLEAN COAL/DIRTY AIR, (1983), argue that a fair amount of the delay and incoherence of the EPA's wet scrubber rule resulted from political influence exerted by two powerful senators.

[159] Compare B. ROSEN, HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE 21 (1982); and K. CLARKSON AND T. MURIS, THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 34 (1981), *with* Weingast and Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking at the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

[160] *See* Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456.

[161] For example, for several years Congress passed appropriation riders prohibiting the National Highway Traffic Safety Administration from utilizing any of its funds to enforce a passive restraints regulation that was not in effect and could not have been enforced in any event.

That Congress passes vague and overambitious statutes, gives agencies too little resources with which to implement them and constantly revels in the suggestion of bureaucratic laziness and sculduggery is well known. By common consent the general politics of congressional policymaking is an amorphous drag on the rulemaking process. But, that substantial amounts of congressional lobbying about agency regulatory activity persists could be attributed more to the ignorance of constituents, the credit-claiming/blame-avoiding craftiness of congresspeople and the public relations skills of Washington lobbyists, than to a political structure that provides major incentives for such activity by those who keep a rationally calculating gaze on the benefits of seeking congressional assistance, discounted by the probability of success, and compared with the inevitable costs.

Even if the intense lobbying of the executive and legislative branches that surrounds major rulemakings is instrumentally irrational, there surely seems to be a lot of it. The executive coordination and legislative oversight games attract hordes of players. For most "behaviorist" analysts that in itself would be sufficient to prove that the participants were adopting rational strategies, and for them to conclude as well that these games, like the judicial review game, were providing major incentives for adversary political warfare. Further, if this sort of ubiquitous struggle is, as some commentators argue, undermining the timeliness and rationality of rulemaking, then the incentive structures of these games are also ripe for reform.

Indeed, even if all this political pulling and hauling is really much storm and fury signifying nothing of rulemaking substance, it may nevertheless signify much concerning the perceived fairness and rationality of the rulemaking process. After all a widespread belief in the body politic that the process of agency rulemaking is "just politics," and subterranean politics at that, will undermine the legitimacy of agency policy directives and simultaneously erode administrators' will to resist political blandishments that diminish rather than enhance the quality of the rulemaking product.

Once again, one should not press this argument too far. The notion that agencies are "in politics" is necessary to the belief that agencies are politically accountable. Hence, the rulemaking design issue is how to integrate agencies into the political structure in a fashion that promotes appropriate political accountability without detracting too substantially from the perception or the reality of fairness and rationality.

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[162] It is, however, clear that agencies are better able to protect themselves from congressional intervention if they shift policymaking into a formal adjudicatory format. *See, e.g.*, Pillsbury Co. v. F.T.C., 354 F.2d 952, 963-65 (5th Cir. 1966). Only in the extreme case in which congressional intervention forced an agency to decide on grounds not authorized by its governing statute is congressional political interference likely to be considered legally illegitimate. *See, e.g.*, D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1245-49 (D.C.Cir. 1972).

Many commentators seem to believe that the most important reform in this direction is to increase the transparency of political contacts in the rulemaking process.[163] Agencies could bind themselves by rule to include all outside communications, whether written or oral, in their rulemaking dockets. They might, of course, make exceptions for communications from the President directly or from those acting with clear delegated power to represent the President.[164] It may well be that agencies should avoid such exceptions save where they are insisted upon by the White House. That would at least lodge the political responsibility for secrecy in the appropriate place. And, of course, with respect to Congress no claim of executive privilege would prevent agencies from memorializing all congressional contacts and including them, along with written communications, in the rulemaking record. Once again, Congress might make certain exceptions by statute, but it also would have to take political responsibility for maintaining that level of confidentiality.

Suspicions concerning OMB might also be dissipated by further opening up the OIRA review process. OMB might itself request that its transmission of communications be included in the rulemaking record;[165] it could avoid the appearance of substantive bias by refusing to waive the necessity for review only because proposals are "deregulatory" in nature; and it could better coordinate its demand that agency regulatory impact analysis (RIA) documents contain sufficient relevant information by coordinating that demand with its regulation of agencies' capacities to demand information from regulated parties. An OMB that refuses to allow the gathering of cost and compliance data that it then faults the agency for ignoring in its RIA hardly inspires confidence in the notion that it is attempting to improve, not just impede, rulemaking.

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[163] *See* Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299 (1991); McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987); Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

[164] *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (holding that presidential ex parte contacts need not be docketed or disclosed where their content is not relied upon to support the rule).

[165] OMB had made considerable strides in regularizing its own processes and eliminating opportunities for undisclosed "conduit" communications by the mid-1980s. The recent breakdown in presidential congressional relations and the new activist posture of the (Quayle) Council on Competitiveness have, however, rekindled suspicion and internecine warfare. *See* Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244 (1992); Vice President Danforth Quayle, "Agenda for Civil Justice Reform in America," Address Before the American Bar Association (Aug. 13, 1991), in N.J. L.J., Aug. 29, 1991; Victor, *Quayle's Quiet Corp.*, NAT'L JOURNAL, July 6, 1991 at 1676; Quayle Council Recommends Killing Recycling Provision in Incinerator Rule, 21 ENV'T REP. (BNA) 1595 (1990).

All of these movements towards transparency would raise the costs of inappropriate political importuning of the regulatory process without necessarily impeding legitimate policy oversight and argument. It would also provide incentives for the executive and legislative branches to explain why particular appeals for agency changes of policy are either technically appropriate or politically sensible from the wider perspective that necessarily adheres in the Congress and the office of the Chief Executive.

Increased transparency concerning the relationships between the political branches and the bureaucracy would have a further salutary effect. It would lessen the burden now borne by the judiciary to attempt to ferret out those circumstances in which apparently rational analytic policymaking has in fact been driven by subterranean political importuning.[166] The felt necessity to allow parties to repair immediately to the judiciary to complain of the general rationality or fairness of rules would correspondingly be reduced.

It would be a mistake, however, to leave the game-theoretic analysis of legislative oversight and executive coordination of agency rulemaking without thinking about these aspects of the external environment of rulemaking from a different perspective. For, the "game" here is not just one in which outside claimants or constituents appeal to different political institutions for help in waging their adversary battles for the hearts and minds of federal agencies. The political institutions also have constitutional roles that structure a two-century-long competition for control over the policy process. In performing in those roles, the political actors respond to normative considerations of constitutional design concerning separated powers in a liberal democracy that harness the desire to please constituents and reward supporters to broader conceptions of the public good. Looking at the problem in this way suggests some quite different insights about (1) the relative power of different institutions to mold the rulemaking process and rulemaking product, and (2) why over time, Congress and the courts have "proceduralized" and "legalized" the forms of internecine warfare that now surround the rulemaking process. This institutional analysis also throws into sharp relief the differing directions down which reformers might proceed in improving the environment of agency rulemaking.

The Legislative-Executive Separation of Powers Game. The spatial model that describes this game imagines that policy is defined by a two-dimensional space in which the President, the House and the Senate each have preferred points.[167] These are represented on Figure 1 by the dots labeled P, H, and S. Q is the status quo or the present state of the world. Q obviously does not conform to the preferred position of any of the three institutions. It lies, however, at the intersection of an indifference curve for each body. (An indifference curve is simply a curve connecting all the points that are equidistant from the institution's most preferred point. It is called an "indifference curve" because it is presumed that an institution or actor is indifferent with respect to points that are equidistant from that institution or actor's most preferred point.)

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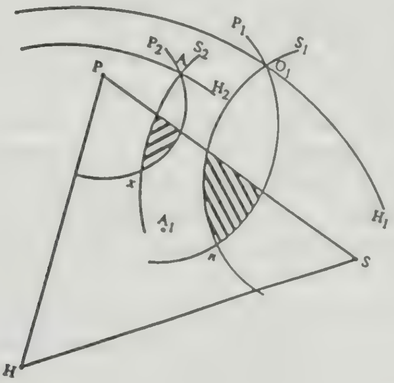
[166] Sierra Club v. Costle, *supra* note 164, is a classic example.

Because the House, Senate, and President each in effect have a "veto" over any legislative proposal, they must bargain about policy. The possible bargains that will make them all better off are defined by the lens QN. All the points within that lens are closer to the preferred positions of all of the actors than is Q. Hence, it is rational for them to make an agreement to enact legislation that defines a policy somewhere within that lens. Indeed, because the House (whose indifference curve is labeled H_1 as it runs through Q), can always propose some policy within the half lens that is inside the triangle and that makes it better off and neither the President nor the Senate worse off, there is no reason for the House ever to agree to a bargain that lies outside of the line PS. The relevant policy space within which a bargain should be struck is therefore the half-lens inside the triangle. Any legislation agreeable to all the parties will define a point somewhere within that half-lens. Or, given that all legislation is vague to some degree, it might be more realistic to imagine statutes as defining the half-lens as the jurisdiction of agencies which can then choose policies within that space.

Figure 1



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[167] The basic model is borrowed from McCubbins, Noll, and Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

From a normative perspective the external environment of rulemaking should be structured to force administrative policy choice within the half-lens. That is the democratically approved bargain embodied in the legislation. Ideally we should want the House, the Senate and the President to nudge the agency toward policy choice within this domain and to press it back into the area defined by the presidential-legislative bargain whenever an agency's policies, for our present purposes embodied in rules, stray from the half-lens of approved policy. Judicial review, not yet represented in the model, should have the same purpose. So far so good, but a little further analysis reveals that it is not so easy to make the system work well. Indeed, the absence of a one-house legislative veto of rules can substantially skew policy outcomes over time.

Assume, for example, that the administrative agency chooses a policy that lies at A. A lies closer to the President's preferences than any policy within the half-lens defined by the legislation, and further from the House and Senate's. If the Congress had a legislative veto, it could quash the agency's choice and presumably any other choice that lay outside the half-lens. Without the legislative veto it must use other techniques to try to force the agency to live with the original legislative bargain, or rely on the judiciary to invalidate the agency's action at the behest of some adversely affected person. But, as our continuous experience with administrative governance has demonstrated, it may be quite difficult for the Congress to enact legislation that will not leave a broad range of discretion to an agency—discretion broad enough to make judicial policing for legality a problematic device for ensuring the integrity of legislative-presidential bargains.

In the absence of effective judicial review to maintain the original bargain, or some other technique for putting pressure on the agency not to choose A, the House and the Senate can legislate to revoke the agency's policy choice and adopt a policy more pleasing to the Senate and the House. Note, however, that the new legislation will define a policy somewhere in the half-lens defined by X and the intersection of the lens with the line PS. Any legislation seeking to move policy back into the lens defined by NQ will be vetoed by the President. And, as the history of attempts to override presidential vetoes reveals, Congress is seldom successful in that enterprise.

The stakes involved in the constitutionality of the legislative veto may thus have been somewhat higher than they appeared at first blush, even to those like Justice White who believed that Congress needed that weapon to maintain parity with the President in the modern administrative state.[168] It is not just that without the legislative veto Congress will have to act by legislation (and perhaps by a supermajority) to overturn a policy with which it is displeased. Because policy choice in a bargaining situation is a function of both the preferences of the actors and the status quo point, in the face of presidential opposition Congress literally cannot get back to the policy space that it thought it and the President had defined in the preexisting statute. This may help to explain why Congress has developed a multitude of other techniques to try to regain the political control that it had with the legislative veto threat, notwithstanding its extremely sparing use of the veto where available.[169]

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[168] INS v. Chadha, 462 U.S. 919, 967-1003 (1983) (White J., dissenting).

Another interesting aspect of looking at policy choice in this fashion is that it reveals something more about the power of an administrative agency under different assumptions about the efficacy of judicial review. Thus, for example, if the agency were to choose a policy like the one indicated at the dot labeled A_1 there would be nothing that any of the political actors could do about it through legislation and only a modest prospect for correction on judicial review. The political actors are disabled from changing the policy by legislation because a policy anywhere within the triangle defines a point from which it is not possible to move without making one of the three actors worse off. The disadvantaged institution will thus veto that move and preserve the policy. (Were we to draw indifference curves for P, H, and S that run through A_1 it would be clear, for example, that any move back toward the lens defined by N and the line PS would make both the President and the House worse off and only the Senate better off.) Any policy inside the triangle is stable.

We might imagine that judicial review could be invoked to move agency policy back within the lens. But, if we think for a minute about the task of discerning exactly where the original legislative-presidential bargain came to rest, we may be doubtful about any court's capacity in this regard. Looking at the terms of the statute and the initial statements (or bills favored) by the House, the Senate and the President might well define a general space like the triangle PHS. Hence the choice of A, outside the triangle, might well be invalidated. But, it seems quite optimistic to imagine that the much smaller policy space defined by the lens will appear with clarity to a reviewing court. Therein lies the wisdom of *Chevron* deference. For, if the court mistakes legislative intent then it will, through its interpretation, define a new status quo point that will also either be stable (if within the triangle) or will lead to a wholly new policy (if outside the triangle) that was not the intent of the legislative-presidential bargain in the first instance.

The likelihood, then, is that agencies will have significant power to make policy choices within the broad boundaries of the political space defined by the preferred positions of the three political institutions to which they are accountable. The separation or "balance" of powers stakes in rulemaking are thus high, even if we assume that each institution is acting out of its own sense of good public policy, not as a simple conduit for private interests. From this "institutional" perspective it is hardly surprising that agency rulemaking is a major constitutional battleground. What we need now to address is why this political-institutional competition has resulted in a rulemaking process that provides a major example of what Bob Kagan has called "adversarial legalism."[170] Put another way, why has the "legislative-executive separation of powers game" produced the "judicial review game" and all its analogous political checks and balances (the executive coordination and legislative oversight games) that empower rulemaking opponents and ossify the rulemaking process.

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[169] *See generally* Jonathan R. Macy, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988); Stephen Breyer, *Reforming Regulation*, 59 TUL. L. REV. 4 (1984).

IV. From Games to Institutional Design

Indeed, the legislative separation of powers game and adversarial legalism leveraged by ubiquitous preenforcement judicial review seem closely connected. It is not mere coincidence that the examples of agency choice in Figure 1's spatial model were all tilted toward presidential preferences. Appointment and removal powers, OMB review, the simple fact of agencies generally being a part of the administrative "team," all tend to give president's an advantage in molding agency behavior.[171] Without an easily exercisable veto over agency rules the Congress must fight back either directly (with much more specific legislation) or indirectly (through oversight, jawboning, or the empowerment of surrogates), even if all these techniques may do more to clutter the landscape of rulemaking with legal obstacles than to improve its fairness, rationality or conformity to legislative-presidential policy compromises.

In particular, recent political science scholarship suggests that much of the procedural complexity and legal control that Congress now builds into rulemaking statutes has its origin in a congressional need to empower its constituents to police legislative bargains that it cannot monitor or enforce on its own.[172] While I have argued elsewhere that I think this analysis somewhat overdrawn, if taken as an attempt to explain the overall structure of administrative procedure,[173] there is surely some power to the argument as well. Arbitrary time limits, hammers, procedural complexity, analytic requirements, heightened evidentiary demands and instantaneous access to judicial review, all give legislative constituents (and others) levers with which to press agency policies in the direction of the original legislative-presidential bargain. (Whether they are well-designed for this task is, of course, a different question.)

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[170] Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985).

[171] Using a different game-theoretic model, Eskridge and Ferejohn reach similar conclusions. William Eskridge and John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J. L. ECON. & ORG. 165 (1992).

[172] *See, e.g.*, Jonathan Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93 (1992) and authorities therein cited.

Thus, however, much administrative law responds to deeper currents in our constitutional culture, the political scientists' story surely suggests that congress has powerful incentives to institute or continue potentially debilitating and delegitimating "legal rights" for various constituencies to challenge agency policy choice. Other means of policy control at its disposal are either weak (oversight) or have all-too-obvious risks of political or policy disaster (specific legislative commands adopted under enormous uncertainty about their consequences).

Although the positive political theory literature has tended to ignore the presidential role in creating legal checks and balances on agency rulemaking, we seldom find the President vetoing legislation because it provides too much in the way of judicial review or rulemaking procedure. And, even though the President or Executive Office of the President seems generally to attempt to influence the rulemaking process through administrative or political means, proceduralized rationality review may well leverage the positions of both executive departments and their constituencies. While the analytic requirements embodied in various executive orders concerning major rulemakings explicitly exclude judicial review of the quality of those analyses, the analyses nevertheless become a part of the rulemaking record. So do analyses provided by other executive departments. Judicial review of agency rulemaking on "the whole record" thus reinforces the necessity for agencies to respond cogently to the positions put forward by executive department agencies and superagencies.

In this sense, then, the courts' struggles to "relegalize" the legislative-executive political warfare surrounding rulemaking—to make it fit the judicial role by creating the contemporary technique of review for "process rationality" —leverages the weight that political warfare between legislative and executive institutions adds to the inertia of the whole rulemaking system. Hence, once again, a strategy for reforming the rulemaking process seems to direct our attention toward the legal controls that statutes and judicial opinions construct and that operate through judicial review. For, if the story that we have been recounting is to some degree true, there may be a mismatch between political motivations and constitutional purposes, on the one hand, and legal technique on the other. Legal leverage is being employed to conduct political-institutional warfare about administrative policy in ways that disempower the policy process.

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[173] J. Mashaw, *Explaining Administrative Process: Normative, Positive and Critical Stories of Legal Development*, 6 J. OF ECON. & ORG. 267 (1990).

A. General Strategies for Reform

Assume for the moment that we now believe the following things: First, the federal rulemaking process is in trouble. Whether regulating or deregulating, it is torpid and potentially irrational. But, second, these "problems" are in some sense constitutionally appropriate. The administrative state, after all, can be considered as a design to evade constitutional checks and balances. Third, and therefore, the agenda for rulemaking reform should not be limited to attempts to free the rulemaking process from restraint. Reform instead should lie in the direction of avoiding an inappropriately legalistic and adversarial rulemaking environment. Finally, the critical juncture at which to make some progress on this project would seem to be by relaxing, to some degree, the legal stranglehold that can be put on the rulemaking process because of its operation under the ever-present shadow of judicial review for "process rationality."

What then is to be done? In broad outline there are three strategies available for decoupling legal and political accountability for administration. The first is to "democratize" the processes of administrative rulemaking. Such a strategy might include such mechanisms as expanded use of regulatory negotiation and specialized constituency voting on agency proposals. The second is a move toward macro-political accountability for bureaucratic policymaking. Congress could either enact rules itself on the proposal of expert bureaus empowered to initiate, but not to decide; or it could develop agency and superagency structures that place policy accountability clearly at the doorstop of the Chief Executive.[174] The third is to recognize the political authority of the bureaucracy itself.[175]

This is obviously not the place to attempt to begin an analysis of the strengths and weaknesses of each strategic approach. That again is a task that would take scores, perhaps hundreds, more pages. I will attempt, therefore, in a short compass to do only two things: First, I will argue that none of these strategies should be taken as the single correct pathway toward reform. Our ingrained political traditions do not counsel, nor are they likely to countenance, such stark institutional choices. Second, I want to suggest that our inability to choose among these strategies need not counsel despair concerning useful, incremental reforms in the rulemaking process. For, if I am correct, none of these strategies need rely upon the sort of legalized and proceduralized rulemaking process that we have blundered into. A rulemaking process crippled by adversary legalism is simply unnecessary to support the claim of rulemaking agencies that they are acting both according to law and within the political framework of democratic accountability that our constitutional traditions teach us is our birthright. Indeed, incremental reforms in all of these directions should further reduce the need for adversary legalism's crucial weapon—preenforcement review of rulemaking—as a prop for the constitutional legitimacy of the administrative state.

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[174] Lloyd N. Cutler, Book Review, Regulatory Mismatch and Its Cure, 96 HARV. L. REV. 545 (1982); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

[175] Stephen G. Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 61-79 (1993) (Oliver Wendell Holmes Lectures, 1992).

Let me take up the second point first. The political legitimacy of rulemaking in a radically democratized rulemaking process would depend upon its responsiveness to a basic liberal democratic value—consent—either negotiation to consensus or citizen voting. This is the "republican"[176] or "strong democracy"[177] strand of American constitutionalism. The macro-political accountability approach by contrast depends for its legitimacy on the authority of constitutionally empowered and democratically elected political institutions. This is, of course, the "Federalist" notion of checked and balanced institutions.

Rules made in either of these forms should have the substantive legal insulation now accorded to legislation, contract, or executive "political" judgment. In none of these situations do courts ask, except in the most cursory, elliptical and hesitant fashion, whether the resulting policies are substantively sensible or procedurally fair to all affected interests. Political judgments clearly allocated to the Chief Executive by statute or the Constitution are nonreviewable.[178] Review of legislative judgments for rationality is virtually moribund if decoupled from some other more specific constitutional claim.[179] Nor do courts ever inquire into the procedural fairness of executive political judgments or of legislative enactment processes beyond strictly formal indicia of regularity.[180] With respect to contracts, whether made by public institutions or private parties, the reasonableness of the bargain is more an interpretive aid than a monitoring criterion.[181] And, on the procedural side, only extreme unfairness (fraud, coercion, or "unconscionability") will delegitimate a formally concluded bargain.[182]

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[176] *See generally* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663 (1988); Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Edley, *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561; Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

[177] Benjamin Barber, Strong Democracy (1984).

[178] Morris v. Gressette, 432 U.S. 491 (1971); Chicago and Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103 (1948).

[179] *Compare* Williamson v. Lee Optical Co., 348 U.S. 483 (1955) with Roe v. Wade, 410 U.S. 113 (1973).

From this perspective it is perhaps understandable why judicial review for process rationality has emerged as the touchstone for the legitimacy of bureaucratic policy judgment. We have taken seriously the Weberian argument that the legitimate authority of bureaucracy derives from its claim to wield power on the basis of knowledge. And, because we distrust bureaucracy, we have provided legal techniques through which it must demonstrate that it has the knowledge that it claims. But this knowledge-based understanding of bureaucratic authority need not link bureaucratic rationality to judicial approval of the reasonableness of administrators' policy judgments. Indeed, Justice Brandeis seemed to have had the political science right in *Pacific States Box v. White*[183] when he stated for the Court that the authority of the administrator flows from the legislative judgment that bureaucratic rationality should be applied to the problem at hand. And for that reason, Brandeis found that the scope of rationality review to be applied by a court to an administrative judgment was precisely the same as that applied to a judgment of the legislature. In short, although the three reform strategies that have been suggested look in radically different directions, none of them require an abstract judicial judgment concerning the reasonableness or fairness of the underlying decisional process as a basis for the constitutional legitimacy of an administrative rule.

Our legal culture has had particular difficulty, however, in recognizing or accepting the Brandeis thesis. Whether this is a "pathology" endemic to pluralistic polities as Theodore Lowi argues,[184] or simply an incremental reaction to disappointments with various administrative regimes, as Richard Stewart suggests,[185] is unclear. It does seem clear, however, that the Supreme Court has been embarked for almost two decades on a project of reinforcing administrative authoritativeness. It cut off the strong proceduralizing tendencies of the lower courts in cases like *Florida East Coast Railway*[186] *and Vermont Yankee.*[187] It tried to make the world safe for administrative interpretation in *Chevron*. And, in cases like *Lujan*,[188] *Bell Aerospace*[189] and *Chaney*[190], it has seemed determined to protect possibilities for administrative policy judgment outside the rulemaking context.[191]

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[180] The *Chadha* case in no way impugns the federal "enrolled bill rule" under which legislation will be overturned for a procedural irregularity only if that procedural flaw is constitutionally based and patent on the face of the legislation itself. Field v. Clark, 143 U.S. 649 (1892); U.S. v. Ballin, 144 U.S. 1 (1892).

[181] Indeed, here the inquiry into rationality is tautological. The contractual behavior of market actors defines economic rationality.

[182] *See* Restatement (Second) of Contracts §162 (1986) (When Misrepresentation is Fraudulent or Material); *id.* §175 (When Duress by Threat Makes a Contract Voidable); *id.* §177 (When Undue Influence Makes a Contract Voidable); *id.* §208 (Unconscionable Contract or Term). *See also* USC §2-302 (Unconscionability).

[183] 296 U.S. 176 (1935).

[184] THE END OF LIBERALISM (2d ed. 1979).

[185] *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

Obviously none of these strategies have been entirely successful in creating a legal environment that facilitates administrative rulemaking. Process rationality review forces proceduralization on administrators even if the lower courts are prevented from mandating specific procedural requirements. And, as we have noted, Chevron is too ambiguous to serve as a rule of decision. A return to the "passive virtues," à la *Lujan* may do more to stimulate litigation about the propriety of litigation than it does to protect the authority of administrators to make policy by rule. For, without going further into the politico-cultural reasons for the limited success of the Supreme Court's now two-decade-long campaign, it seems reasonably clear that the reform strategy of bolstering the authoritativeness of agency policy choice confronts considerable resistance.

One might conclude, therefore, that if deossifying rulemaking requires delegalizing it by reducing the intrusiveness of judicial review, we are constrained to emphasize reforms featuring the legitimating strategies of "democratization" or "macro-political" accountability. Yet, it is hard to believe that these approaches could provide an overall solution either, even if combined and selectively applied to different parts of the rulemaking universe.[192]

For complex reasons, well described in James Marone's The Democratic Wish, the first strategy seems relatively implausible as a general remedy. Our continued flight from bureaucracy in the name of democracy has just as continually increased both bureaucracy and bureaucratic-adversarial legalism.[193] A demand for actual consent through multi-party negotiation seems a formula either for stalemate or capture, unless it is highly selectively applied. And, it is hard to be attracted to governance by focus groups, Ross Perot's imagined electronic plebiscites, or those special interest plebiscites currently conducted in small pockets of the administrative state (such as the marketing orders of the Department of Agriculture).

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[186] United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973).

[187] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[188] Lujan v. National Wildlife Federation, 110 S.Ct. 3177 (1990).

[189] NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

[190] Heckler v. Chaney, 170 U.S. 821 (1985).

[191] Peter Strauss agrees that the Supreme Court seems to be attempting to find ways to take "serious account of political controls over agency behavior as alternatives to judicial controls." Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 U.C.L.A. L. REV. 1251, 1319 (1992). The court's recent decision in United States v. State of Alaska, 60 U.S. L. W. 4315 (April 21, 1992) is another straw in the wind. There the court read into §10 of the Rivers and Harbors Appropriation Act of 1899 a very broad authority on the part of the Secretary of the Army to take the political interests of the United States into account when ruling on a request for a federal permit to built port facilities.

[192] For a general proposal along this line but with a "corporatist" spin *see* Ian Ayers and John Braithwaite, Responsive Regulation (1992).

Nor does the macro-political accountability stratagem seem capable of general applicability. The consensus both inside the Congress and outside it has been that a general provision for legislative vetoes of administrative rules would be unworkable, even if constitutional. If so, adopting rules by congressional legislation on the proposal of expert bureaus seems an even less plausible candidate for a general reform strategy. Developing agency or superagency structures that place political accountability for agency rulemaking clearly with the Chief Executive is a technically more realistic candidate. Yet the constitutional politics of institutional competition limits this approach as well. While Congress has come close to some general validation (combined with reform) of executive oversight mechanisms, it has never been able to come to closure on the issue. Congress seems destined, in any event to leave the independent agencies outside the ambit of any accountability structure that it will either devise or agree to, and may well be growing more, rather than less, attached to the independent agencies idea.

Let me hasten to add that by suggesting that neither micro-democracy nor macro-political accountability provides a general path toward reforming all agency rulemaking, it seems clear that selective applications of both have been used, and will continue to be used, as regulatory or rulemaking reform mechanisms. Moreover, while our politico-legal culture is anti-bureaucratic, congressional statutes, supported by Supreme Court doctrine, consistently empower (or attempt to empower) administrators to make political decisions by delegating them broad powers combined with vague criteria for action. If our political ideology were defined by what we do rather then by what we say, the political authority of bureaucracies to make legitimate policy, that is, policy as free from judicial second-guessing as the policies made by other political institutions, would already be well-established in our constitutional folklore.

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[193] Marone describes an extended four-stage process as the general dynamic of American political action. First, the process begins with the political stalemate of checks and balances or institutional fragmentation. In the second stage there is a call for reform in the name of "the people." These calls often fail, but if they succeed they move on to a third stage that institutionalizes the power of "the people," or more precisely, the new organizations or groups that articulated and benefitted from the process of reform. These new institutions redirect energy into conflicts about their policies and activities. Thus, while they expand the bounds of government power, they do so largely by restructuring conflicts and shifting the balance of pluralistic competition. Over time these new institutions become encrusted with new checks and balances that seek to redress or equalize competition over the new public powers and new political privileges that are available to newly legitimated groups. This institutional stasis recreates the inertia of institutional stalemate that is the characteristic of stage one of the process. *See generally* JAMES A. MARONE, THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT (1990).

B. Playing the Timing Card

The first step toward making our ideology consistent with our practice, therefore, may be to launch a sustained attack on the notion of the general availability of preenforcement judicial review of agency rules. A persuasive case can be made that this relatively recent development in our administrative jurisprudence is normatively unnecessary, institutionally incapacitating and, given its effect on the role of the courts in governance, constitutionally inappropriate. Recognizing that Congress may choose means of policy choice that combine micro-democracy, macro-political accountability and bureaucratic authority, and that none of these need be backed by adversarial legalism, at the point of abstract policy choice, should put no particular strain on our constitutional order.

The game-theoretic analysis that we earlier employed suggests the obvious difficulty of getting from where we are now to the sort of understanding of preenforcement review that the last few paragraphs advocate. The constituencies currently empowered by the structure of that game will resist. However, that does not necessarily foreclose pursuit of this direction for reform. Not only do most modern foreign nations decompose political and legal control of administration, applying legal controls largely at the stage of implementation, there is much state practice within the United States that looks in the same direction. The apparent recognition in the new Model State Administrative Procedure Act of the political nature of rulemaking and of the good sense of making choices among and between political and legal controls, rather than throwing all types of each at every problem, is at least some authority for the proposition that such an approach is possible in the American legal culture. Whether and how the last three decades' movement toward preenforcement review of administrative agency policy choices can be undone—or at least selectively applied within the context of particular agency tasks and the overall framework of political control—is a topic that deserves much more detailed analysis.

Table 1

Government Employment and Population, 1960-90[*]

	Government employment				Population	
Fiscal Year	Federal executive branch[1] (thousands)	State & local governments (thousands)	All governmental units (thousands)	Federal as percent of all governmental units	Total United States (thousands)	Federal Employment per 1,000 population
1960[2]	2,371	6,073	8,444	28.1	180,671	13.1
1961[2]	2,407	6,295	8,702	27.7	183,691	13.1
1962	2,485	6,533	9,018	27.6	186,538	13.3
1963[3]	2,490	6,834	9,324	26.7	189,242	13.2
1964[3]	2,469	7,236	9,705	25.4	191,889	12.9
1965	2,496	7,683	10,179	24.5	194,303	12.8
1966	2,664	8,259	10,923	24.4	196,560	13.6
1967	2,877	8,730	11,607	24.8	198,712	14.5
1968	2,951	9,141	12,092	24.4	200,706	14.7
1969[4]	2,980	9,496	12,476	23.9	202,677	14.7
1970[2]	2,944	9,869	12,813	23.0	205,052	14.4
1971[2]	2,883	10,372	13,255	21.8	207,661	13.9
1972	2,823	10,896	13,719	20.6	209,896	13.4
1973	2,775	11,286	14,061	19.7	211,909	13.1
1974	2,847	11,713	14,560	19.6	213,854	13.3
1975	2,848	12,114	14,962	19.0	215,973	13.2
1976	2,832	12,282	15,114	18.7	218,035	13.0
1977[5]	2,789	12,704	15,493	18.0	220,904	12.6
1978	2,820	13,050	15,870	17.8	223,276	12.6
1979	2,823	13,359	16,182	17.4	225,779	12.5
1980[2]	2,821	13,542	16,363	17.2	228,468	12.3
1981[2]	2,806	13,274	16,080	17.5	230,848	12.2
1982	2,768	13,207	15,975	17.3	233,184	11.9
1983	2,819	13,220	16,039	17.6	[6]235,439	12.0
1984	2,854	13,504	16,358	17.4	[6]237,663	12.0
1985	2,964	13,827	16,791	17.7	[6]239,951	12.4
1986	2,967	14,157	17,124	17.3	[6]242,295	12.2
1987	3,030	14,402	17,432	17.4	[6]244,627	12.4
1988	3,054	14,766	17,820	17.1	[6]247,039	12.4
1989	3,064	15,144	18,208	16.8	[6]249,493	12.3
1990[2]	3,067	16,377	18,404	16.7	[6]252,145	12.2

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[*] From U.S. Budget, 1992, Part 4 at page 203.

[1] Covers total end-of-year civilian employment of full-time permanent, temporary, part-time, and intermittent employees in the executive branch, including the Postal Service, and, beginning in 1970, includes various disadvantaged youth and worker-trainee programs.

[2] Includes temporary employees for the decennial census.

[3] Excludes 7,411 project employees in 1963 and 406 project employees in 1964 for the public works acceleration program.

[4] On Jan. 1, 1969, 42,000 civilian technicians of the Army and Air Force National Guard converted by law from State to Federal employment status. They are included in the Federal employment figures in this table starting with 1969.

[5] Data for 1956 through 1976 are as of June 30; for 1977 through 1989, as of Sept. 30.

[6] U.S. population data for 1984-1990 are the latest available from the Census Bureau.

Table 2

Federal Aviation Administration: (The figures in parenthesis represent "significant" regulation, as designated by the FAA).

Date	PreRule	Proposed Rule	Final Rule Stage	Completed Action
1992	2(6)	51(28)	47(18)	18(2)
1991	2(0)	71(0)	49(0)	31(0)
1990	5(2)	61(24)	44(18)	31(9)
1989	11(1)	61(29)	37(14)	20(14)
1988	24(6)	47(15)	46(14)	9(3)
1987	21(4)	54(19)	22(7)	17(4)
1986	5(2)	68(19)	33(12)	19(7)

	Current/Projected Rule	Review of Existing Rule	Completed Action
1985	90	9	10
1984	94	10	5
1983	65	3	17

Table 3
Environmental Protection Agency: FIFRA

Date	PreRule	Proposed Rule	Final Rule Stage	Completed Action
1992	0	15	8	0
1991	0	13	5	1
1990	0	14	6	0
1989	0	11	5	1
1988	1	8	8	0
1987	2	10	5	3
1986	0	7	8	6

	Current/Projected Rule	Review of Existing Rule	Completed Action
1985	15	0	1
1984	15	6	3
1983	6	0	0

Report for Recommendation 93-5

Regulating Pesticides: FIFRA Registration, Reregistration, Suspension, & Cancellation

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

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Executive Summary

The federal Environmental Protection Agency cannot accomplish its substantive mission in regulating pesticides without significant change and improvement in the Agency's regulatory procedures. For over twenty years, EPA has been charged under the Federal Insecticide, Fungicide & Rodenticide Act ("FIFRA") to prevent "unreasonable risks" to public health or the environment from pesticide use. Yet scientists within and without the government repeatedly are finding that some pesticides may continue to pose unreasonable risks. There is growing evidence that EPA's lack of success in assessing, managing, and/or preventing such risks is related to glaringly ineffective administrative procedures.

Without significant improvements in regulatory procedure, moreover, the ambitious substantive changes to FIFRA and related provisions of the Federal Food Drug and Cosmetic Act ("FFDCA") now under consideration will be as incapable of successful implementation as the current statutory program. Among other things, policymakers in the 103rd Congress and the Clinton Administration are now debating the merits of replacing the current zero-risk standard for carcinogenic pesticide residues (in the so-called "Delaney Clause" of the FFDCA) with a more nuanced "negligible risk" standard. There is also debate about expanding the types of risks under FIFRA on which EPA's risk assessments focus (for example, by assessing the risks pesticides pose both to the general population and to infants and children in particular). In addition, there is interest in requiring EPA to expedite the registration and use of a new generation of "safer" pest management products and practices. Yet, the modern history of pesticide regulation makes crystal clear that FIFRA's substantive commands are only as real as the effectiveness of regulatory procedures provided for agency implementation.

This Report urges the need for, and recommends the adoption of, a coordinated and strategic procedural framework for FIFRA in which the Agency's multiple processes for pesticide regulation interrelate rather than interfere with each other, and reinforce rather than distract from the Agency's central regulatory mission. The legislative history of FIFRA reveals the steady accretion of procedural devices that may each, at the time of adoption, have seemed helpful to the particular concerns on which policymakers were focused. But viewed as a whole, FIFRA has become so overly proceduralized as to prevent EPA from doing its job. FIFRA now incorporates unnecessarily rigid procedures for each of the three major tasks assigned to EPA's Office of Pesticide Programs: the reregistration of existing pesticides; the cancellation and suspension of existing pesticides; and the registration of new pesticides. As importantly, EPA has not been given other, more flexible and incremental tools that could help the

Agency make defensible decisions in the face of disturbing but uncertain databases.

Even without any further change in its statutory responsibilities, EPA needs more streamlined procedures and the ability to use procedure more creatively to carry out its work. Above all else, EPA needs procedures that create multiple and reinforcing incentives for regulatory compliance by registrants; for timely and accurate decisionmaking by EPA; and for effective public participation.

This Report recommends a package of procedural reforms that create overlapping incentives for the timely submission of adequate data from pesticide registrants during reregistration; for a more open but still flexible method of crafting interim risk reduction measures while final reregistration is pending; for ensuring that interim measures translate into real risk reduction in the field; for expediting the registration of safer pesticides; and for the increased, cost-effective use of safer pesticides through the "phase-down" of relatively risky existing pesticides that the Agency reasonably believes to be replaceable by safer pest management practices and products. Additionally, this Report recommends removing disincentives to cancellation and other agency actions by replacing the current opportunity for formal adjudicatory hearings with a more streamlined form of informal decisionmaking and by "de-coupling" the Agency's suspension and cancellation decisions.

The specific conclusions of this Report are as follows:

REREGISTRATION AND CANCELLATION: These central components of FIFRA now depend unfortunately on the lengthiest administrative processes among all government programs across the federal government. Registrants can now demand formal adjudicatory hearings, which have in the past averaged over 1000 days to complete, for cancellations of a pesticide's use as well as for changes in a pesticide's classification from "general use" to "restricted use" (even if no cancellation is involved), and even for denials of initial registration. Partially to address the problem, EPA designed a "Special Review" process to expedite regulatory attention on especially problematic pesticides, only to have Special Review itself come to take years—sometimes over a decade—to complete. The reregistration of all pesticides, which Congress originally wanted finished by 1976, was so mired in delay that Congress in 1988 adopted amendments to FIFRA specifically aimed at forcing reregistration to be completed by 1997. Yet the General Accounting Office has found, and EPA itself has admitted, that reregistration may not be completed until the year 2002, 2004, or beyond. The intractability of delay in reregistration and cancellation not only undermines the central premise of FIFRA—that pesticide registrants bear the burden of proof to keep their products on the market—but is especially inexcusable because it occurs at a time when EPA's Science Advisory Board is finding that pesticide exposure is among the top risk-based priorities facing EPA and when the National Academy of Sciences is finding that pesticides not only may pose significant dietary risks but also that alternative products and practices exist to reduce these risks without losing pest management benefits. This Report recommends that FIFRA be amended to provide for the automatic suspension of higher priority pesticides, those classified as "List A" pesticides under the 1988 FIFRA Amendments, for which there remain, by a date determined by Congress, outstanding significant data gaps within the registrants' control. Nothing could better serve as a rough priority-setting device for Agency action or could better reverse the pervasive incentives for delay that permeate the reregistration process. Nor could any other single device better effectuate the underlying procedural premise of FIFRA that registrants truly bear the burden of not being able to demonstrate the reasonableness of their pesticides in the face of uncertainty.

It is also important that FIFRA be amended to remove unnecessary procedural disincentives to EPA from pursuing cancellation actions against those pesticides that the Agency already believes to pose unreasonable risks. To this end, FIFRA should provide more flexible and streamlined procedures than the formal adjudicatory hearings now provided under FIFRA Section 6(d). Especially as to formal hearings for cancellation, more streamlined decisionmaking can preserve constitutionally required process for registrants while offering direct benefits in efficient agency decisionmaking. Streamlined cancellation procedures, moreover, reduce the pressure on EPA to compromise with registrants on matters of substance during pre-hearing negotiations simply to avoid the resource drain on EPA personnel that formal cancellation hearings require. For this shift in process to be meaningful, however, it is imperative that new procedures not unduly deprive registrants of participatory rights (and thereby risk being set aside by the courts on constitutional grounds) but still be sufficiently streamlined to better protect public health and the environment. For this reason, this Report urges the need for a hybridized process generally patterned on notice-and-comment rulemaking but retaining several limited features usually associated with adjudication. The process urged here, however, is much simpler than the overly proceduralized form of "informal rulemaking" now advocated in the leading congressional FIFRA reform bill, the Lehman/Bliley bill.

As an equally important device for quickly achieving meaningful risk reduction in the short term, it also makes sense to provide EPA with more flexible procedural tools with which to regulate pesticides than the "all-or-nothing" alternatives of complete cancellation or cumbersome Special Review on the one hand and fully completed reregistration on the other. To this end, this Report endorses the concept of tiered regulatory procedures. In particular, this Report urges that EPA develop an internal strategy for the selective use of Special Review, but also use a more informal process for negotiating label changes with registrants that might achieve risk-reduction gains more quickly than either Special Review or cancellation procedures. (To complement these regulatory tools, this Report includes in its recommendations on safer pesticides that EPA be given informal rulemaking authority to order the "phase down" of those pesticides awaiting reregistration when interim data on risk and the prospects of safer alternatives make continued levels of usage unreasonable).

As to label negotiations between EPA and registrants, it is important to anticipate predictable questions of public participation that may arise—indeed, questions that have already arisen due to EPA's current reliance on informal negotiations. The central problem arises from a dilemma. On the one hand, to open label negotiations to full public participation might well cut off the possibility that EPA can obtain quick, voluntary risk-reduction measures from registrants. On the other hand, EPA's programs under FIFRA have in the past been seriously distracted by charges of secret negotiations with pesticide registrants—a problem with a possibility of recurrence that would be foolish to ignore. This Report concludes that the tension between efficiency and wide participation in label negotiations should be managed by (1) allowing EPA to negotiate label changes privately with registrants, but only so long as (2) the Agency discloses in the Federal Register at the outset that negotiations have begun and opens a publicly available negotiation docket into which interested persons may submit information, (3) the Agency, promptly at the time negotiations are concluded, documents the date and time of meetings and the substance of negotiations in the public negotiation docket, (4) the Agency publishes the proposed label change in the Federal Register and provides a 30-day public comment period before it decides whether to publish the label change as final, and (5) the Agency, after the label change goes into effect, keeps open the public negotiation docket into which it and the affected registrant are REQUIRED promptly to submit any information they obtain regarding the efficacy of label changes in achieving (or not achieving) risk reduction.

SUSPENSION AND DATA MANAGEMENT: Although Congress has on several occasions recognized the wisdom of giving EPA authority to suspend as well as permanently cancel a pesticide's registration, improved regulatory design could make suspension a far more effective tool. Suspension is theoretically available in two general situations. First, to clear markets of pesticides whose registrants fail to fulfill their data obligations under the reregistration program. Second, to clear markets during the pendency of cancellation proceedings of pesticides that pose an "imminent hazard" to public health or the environment.

In both cases, the value of the Agency's suspension authority is unduly hobbled by existing constraints.

First, the use of suspensions to police data obligations must be made a more credible regulatory tool. FIFRA now puts two limitations on EPA's ability to issue Notices of Intent to Suspend ("NOIS") to registrants that fail to meet their data obligations: (1) registrants can request formal evidentiary hearings on the NOIS, and (2) all suspended registrations "shall be reinstated" whenever registrants fully comply with the data requirements at issue. Although EPA has found it increasingly necessary to issue NOIS due to the failure of registrants to meet deadlines for data submission, the prophylactic effect from such measures is undermined by the assurance of complete reinstatement of registration without further penalty upon the ultimate, untimely submission. This Report urges that EPA's authority to suspend registrations be streamlined to require a NOIS and a thirty-day opportunity to comment on the reasons given by the Agency in the NOIS. Registrants should be able to seek prompt judicial review of the Agency's action. To the extent registrants submit untimely data prior to suspension, EPA should be authorized to impose administrative penalties. To improve data adequacy, EPA should improve its procedures for promulgating clear data standards and for further elaborating on the Agency's data expectations proactively and informally with registrants. Having done its job, however, EPA should be authorized to impose administrative penalties on inadequate data (regardless of timeliness).

Second, as to those pesticides that pose "imminent hazards," EPA needs a more streamlined process on which to base suspensions. Except in certain emergency situations, EPA may currently suspend an imminent-hazard pesticide only after first affording registrants the opportunity to request a formal evidentiary hearing; although this hearing is expedited in the limited sense that it must begin relatively quickly and reach closure soon after the parties have presented their evidence, the normal rules governing the development of evidence in formal cancellation hearings generally apply. Moreover, EPA may not now suspend an imminent-hazard pesticide unless it simultaneously issues a notice of intent to cancel the pesticide's registration, forcing the Agency to contemplate the resource constraint of parallel, full-fledged cancellation hearings even if it seeks to act temporarily on new information of a pesticide's risks. EPA should retain its ability to act summarily in the face of true emergency situations, but should be able to suspend "imminent hazard" pesticides in non-emergency situations pursuant to a notice-and-comment process that can be promptly reviewed in the courts of appeals.

REGISTRATION OF SAFER PESTICIDES: To the extent that policymakers decide to encourage the registration of safer pesticides (a substantive decision involving a complicated, but not necessarily intractable, debate over the meaning of "safer"), it is important that there be a procedural framework which offers real, rather than symbolic, prospects for implementation. Perhaps more than any other regulatory innovation, the registration of safer pesticides can improve EPA's willingness to regulate existing pesticides because the Agency will have less concern that regulation must necessarily incur negative trade-offs in crop protection. Effective procedures for registering safer pesticides may go a long way to reducing "global" incentives for delay in EPA's innumerable reregistration, cancellation, and suspension decisions. A procedural strategy to encourage safer pesticides is not so much a subsidy for an arbitrarily selected class of new products as it is an equalizing mechanism that eliminates the regulatory asymmetry that now exists between new products that deserve to be tried despite some amount of uncertainty and older products that maintain their registrations and marketability in the face of data uncertainty.

To take advantage of comparative risk analysis and market-like regulatory incentives, EPA should also be authorized to conduct an informal rulemaking to "phase-down" the use of existing pesticides whenever the combination of risk data on the existing pesticides and the availability of safer pest management products or practices leads EPA to believe that current risk levels are unreasonable. "Phase-down" rulemakings would link in a strategic, reinforcing manner EPA's databases on existing pesticides with its registration of safer pesticides. Not only would such rulemakings provide an action-oriented mechanism by which the Agency could bring to bear comparative risk analysis (a form of analysis supported in principle by EPA's current and past political management, career staff, and Science Advisory Board), but the phased-in nature of the Agency's decisions would allow time for real-world feedback and further policy adjustment if necessary. In addition, phased-in use reductions—as opposed to outright product cancellations—would employ market mechanisms by which users who can most easily and cost-effectively shift to safer forms of pest management will do so while still leaving other users with access to existing pesticides at a higher (but still cost-effective) price.

Formal Proposed Recommendations reflecting these, and several other, suggestions for reform appear at the conclusion of this Report.

I. Introduction

Reform of federal pesticide regulation under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")[1] and the Federal Food Drug and Cosmetic Act ("FFDCA")[2] has become one of the first environmental issues to come before the 103rd Congress and the Clinton Administration. Even prior to a flurry of activity regarding pesticide policy in the Summer and early Fall of 1993, political interest in regulatory reform had been awakened by reactivation of the so-called "Delaney Clause" in FFDCA Section 409 ("Delaney"). In February 1993, the Supreme Court denied certiorari in *Les v. Reilly,*[3] a Ninth Circuit Court of Appeals decision requiring the federal Environmental Protection Agency ("EPA") to interpret literally Delaney's prohibition in processed foods of residue from any pesticide "found to induce cancer in man or animal." EPA has indicated that the Court of Appeals' mandate will require it to cancel under FIFRA the registrations, and to prevent under FIFRA the reregistrations, of some widely used pesticides. Although concern over these prospects by growers, pesticide producers, and members of the food industry explained until recently much of the substantive focus of the current political debate, it never did explain the full scope of the debate. Once reopened, the debate over regulatory reform has grown to include longstanding concerns—many of them explicitly procedural in nature—with FIFRA's basic design and with the statute's implementation by EPA's Office of Pesticide Programs ("OPP"). The release in June 1993 of a much-anticipated National Academy of Sciences report on pesticide residues and children's health focused on the adequacy of underlying risk assessments.[4] In the wake of the NAS recommendations, the Clinton Administration has urged the streamlining of mechanisms under FIFRA for replacing unreasonably dangerous pesticides with relatively safer pest control products and practices.[5]

Historically, the underlying problem of pesticide policy has been to implement a defensible standard of "reasonable risk" that effectively placed the burden of proof on pesticide registrants to show that their products' risks are acceptable under FIFRA's cost-benefit framework. Although FIFRA has been amended repeatedly to emphasize that registrants must bear this burden, the regulatory delay involved in making the reasonable risk determination effectively has allowed some (and perhaps many) pesticides to remain on the market despite real uncertainty that they reflect a reasonable accommodation of risks and benefits. For almost 20 years, the General Accounting Office has criticized OPP's efforts to reregister older pesticides and to remove from the marketplace or otherwise restrict pesticides with unacceptable risks.[6] Although OPP must surely share some accountability for regulatory failure, this Report suggests that poor statutory design has also played a significant role. FIFRA forces EPA to wander on an analytical treadmill that makes forward progress strenuous if not impossible.

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[1] 7 USC §136-136y (1991).

[2] 21 USC §301-394 (1990).

[3] 968 F.2d 985 (9th Cir. 1992), cert. denied 61 U.S.L.W. 3584 (U.S. Feb. 19, 1993).

[4] *See* National Research Council, Pesticides in the Diets of Infants and Children 8 (National Academy Press 1993) ("Although tolerances establish enforceable legal limits for pesticide residues in food, they are not based primarily on health considerations, and they do not provide a good basis for inference about actual exposures of infants and children to pesticide residues in or on foods").

[5] *See* Joint Press Release R-141, June 25, 1993, Environmental Protection Agency, Food & Drug Administration, United States Department of Agriculture ("The Clinton Administration today announces its commitment to reducing the use of pesticides and to promote sustainable agriculture"); *see also* Executive Summary of Administration Proposed Reforms for Pesticides/Food Safety, 17 Chem. Reg. Rep. (BNA), No. 26, 1147 (Sept. 24, 1993).

The problem of regulatory delay dominates analysis of procedural reform under FIFRA. Among its most conspicuous failings, FIFRA in Section 6 allows EPA to cancel a pesticide's registration only after affording registrants the opportunity to demand a formal evidentiary hearing. The distortions created by formal adjudication go beyond the direct burdens on EPA of adequately staffing such proceedings—proceedings which are resource intensive affairs often taking years to complete.[7] Because both EPA and registrants realize the administrative burdens imposed by formal hearings, EPA is forced to make most of its actual cancellation decisions in the shadow of Section 6 through an extra-statutory process known as "Special Review," and through even more informal "pre-Special-Review" negotiations, in which OPP collects further data from, and negotiates with, registrants of suspect pesticides. The scale of bureaucratic delay in the combined Special Review/Cancellation process is notorious: among the most lengthy administrative processes in the entire federal government have been OPP's Special Reviews of the fungicide Captan (nine years),[8] of fungicides containing cadmium (ten years)[9], and of a group of fungicides known as the ethylene bisdithiocarbamates or EBDCs (over 12 years).[10] President Bush's EPA Administrator, William Reilly, concluded in 1989: "The current pesticide cancellation process is complicated, duplicative, and inefficient. This country cancels trading in bad stock faster than it gets rid of a bad pesticide."[11]

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[6] *See, e.g.*, U.S. General Accounting Office, Pesticides: Information Systems Improvements Essential for EPA's Reregistration Efforts 2 (Nov. 1992) ("EPA's information management problems are traceable to inadequate systems planning and poor data management"); U.S. General Accounting Office, Pesticides: 30 Years Since Silent Spring—Many Long-Standing Concerns Remain 1 (July 1992) ("Since our first report on pesticides some 24 years ago, we have issued over a hundred reports and testimonies dealing with pesticide regulation"); U.S. General Accounting Office, Pesticides: EPA's Formidable Task to Assess and Regulate Their Risks 4-5 (1986) ("EPA's Special Review process for dealing with pesticides where new evidence raises a concern about a significant health or environmental risk, has generally taken 2 to 6 years—contrary to EPA's goal of quickly making decisions on potentially hazardous pesticides"); U.S. General Accounting Office, Federal Pesticide Registration Program: Is It Protecting the Public and the Environment Adequately From Pesticide Hazards? i (1975) ("The American consumer has not been adequately protected from the potential hazards of pesticide use because of inadequate efforts to implement provisions of the Federal laws....").

[7] *See* Study on Federal Regulations: Vol. IV, Delay in the Regulatory Process, S. Doc. No. 72, 95th Cong., 1st Sess. 33 (1977) (average of over 1,000 days from referral for hearing to termination), cited in Thomas O. McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 GEO. L. J. 729, 730 n. 11 (1979) ("Pesticide cancellation hearings on the average probably consume more total time for all decisions than any other administrative proceeding").

The other major source of regulatory delay is found in FIFRA's registration and reregistration programs. When FIFRA was amended in 1972, it required EPA to base its regulatory decisions on an "unreasonable risk" standard which—in all contexts other than carcinogenic residues in processed foods governed by the zero-risk standard of the Delaney Clause—balanced the health and environmental risks against the agricultural benefits of pesticides. Not only was EPA required to use this standard in deciding whether to grant new registrations, but it was required to reregister all previously registered pesticides by applying the unreasonable risk standard to updated data on "old" pesticides. Although there is concern that the stringency of the Agency's initial registration procedures unduly hampers approval of newer, safer pesticides, it is in OPP's reregistration efforts that delay has been most notable. Despite a congressional requirement in 1972 that EPA reregister all pesticides by 1976, Congress was forced in 1978 to abandon its deadline after concluding that OPP's reregistration efforts had come to a "virtual halt."[12] Ten years later, OPP had reregistered only five active ingredients (out of the eight hundred active ingredients then registered),[13] prompting Congress in 1988 to adopt an altogether new set of strict timetables for reregistration in FIFRA Section 4. Although the new requirements call for the completion of reregistration by 1997, OPP has already indicated that this target date may not be met until the year 2006.[14] As of January 1993, only seven percent of older pesticides had been reregistered,[15] and as of May 1993 OPP had reassessed the data on and issued Reregistration Eligibility Documents for only ten out of 150 of the Agency's highest priority ("List A") pesticides.[16] EPA's task may become even more daunting if Congress demands that OPP elicit and evaluate more data on health risks to children,[17] and on the synergistic and cumulative effects of total pesticide exposure among the general population.

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[8] *See* 45 Fed. Reg. 54938 (1980) (initiating Special Review of Captan) and 54 Fed. Reg. 8116 (1989) (Notice of intent to cancel most registrations; Conclusion of Special Review).

[9] *See* 42 Fed. Reg. 56574 (1977)(initiating Special Review) and 52 Fed.Reg. 31076 (1987) (conclusion of Special Review; intent to cancel registrations of pesticides containing cadmium).

[10] *See* 42 Fed. Reg. 63134 (1977) (initiating first Special Review), 52 Fed. Reg. 27172 (1987) (initiating second Special Review), and 54 Fed. Reg. 52158 (1989) (preliminary determination to cancel certain registrations of EBDCs).

[11] William K. Reilly, Press Conference on the Administration's Food Proposal, October 26, 1989 (quoted in Hearings on the Pesticide Safety Improvement Act of 1991, House Subcomm. on Department Operations, Research, and Foreign Agriculture, Comm. on Agriculture, 102nd Cong., 2d Cong. at 285 (March 18, 1992) (testimony of Erik Olson)).

[12] H.R. Rep. No. 663, 95th. Cong., 1st Sess. 18, reprinted in 1978 U.S. Code Cong. & Admin. News 1988, 1991.

[13] H.R. Rep. No. 939, 100th Cong., 2d Sess. 28, reprinted in 1988 U.S. Code Cong. & Admin. News 3474, 3477.

[14] U.S. General Accounting Office, Pesticide Reregistration May Not Be Completed Until 2006 7 (May 1993) ("According to program projections EPA made in March 1993, the agency…has estimated it

This Report focuses on procedural reform of FIFRA. Separating the procedural from the substantive can, as a general matter, present difficulties, especially in a statute such as FIFRA, which has inspired an academic literature analyzing the political and policy dimensions of several procedural provisions.[18] Nonetheless, it is often possible to draw practical distinctions between substance and procedure in the current debate over pesticide reform. For example, in February 1993 Senator Edward Kennedy and Representative Henry Waxman introduced into their respective chambers identical bills that would replace Delaney's zero-risk standard with a highly detailed set of statutory criteria defining the circumstances under which EPA may find a pesticide's risks to be "negligible;" speaking generally, these criteria would allow EPA to grant "tolerances" under FFDCA, and to grant registration or reregistration under FIFRA, to those pesticides that present less than a 1-in-1-million excess risk of cancer or other adverse human health effects. In contrast, Representatives Richard Lehman and Thomas Bliley introduced into the House in April 1993 a bill that would replace Delaney with a more open-ended principle of "negligible risk" depending to a much greater extent on EPA's discretion and professional

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would complete the reassessment of all 642 [active ingredients] only in 2001 or 2004 and complete product reregistration in 2003 or 2006, depending on whether projected funding limitations are addressed").

[15] U.S. E.P.A., Pesticide Reregistration Progress Report, EPA 738-R-93-001, at 1 (Jan. 1993). Through fiscal year 1992, EPA had reregistered only 31 pesticide products out of some 20,000 products requiring reregistration, although it had completed the reassessment of data and issued Reregistration Eligibility Documents for some 2,300 more products. *See* U.S. General Accounting Office, *supra* note 14, at 4.

[16] *See* U.S. General Accounting Office, *supra* note 14, at 14.

[17] *See*, e.g., National Research Council, *supra* note 4, at 8-12 (recommending that EPA needs to acquire more, and better, data on such risks).

[18] The most comprehensive study of FIFRA sounding this theme is Christopher J. Bosso, Pesticides and Politics (1987). For other examples in the political science literature, *see* Anthony J. Nownes, Interest Groups and the Regulation of Pesticides: Congress, Coalitions, and Closure, 24 Pol. Sciences 1 (1991); Angus MacIntyre, Administrative Initiative and Theories of Implementation: Federal Pesticide Policy, 1970-1976, 1985 PUB. POL'Y AND THE NAT. ENVT. 205. In the legal literature, I have elsewhere discussed FIFRA's legislative history in the context of modern positive political theory. *See* Donald T. Hornstein, Lessons From Federal Pesticide Regulation On the Paradigms and Politics of Environmental Law Reform, 10 YALE J. ON REG. 369 (1993).

judgment. As a rule, this Report views choices between policy options such as these as largely substantive and expresses no opinion.[19]

In contrast, some of the issues raised in pesticide reform proposals seem procedural in nature as an intuitive matter. The Lehman-Bliley bill, for example, proposes to allow EPA to "cancel" registrations under FIFRA by informal rulemakings rather than the formal adjudications that FIFRA now requires. The bill requires, however, a plethora of informal procedures, including requirements that any proposed rulemakings be preceded by an Advance Notice of Proposed Rulemaking and that the ANPR be itself preceded by consultation between EPA and a specially constituted "scientific peer review committee" (not to be confused with a separate "Scientific Advisory Panel" which is required to review all proposed rulemakings). This Report treats proposals such as these as fundamentally procedural—and fully within the scope of analysis.

Finally, there are some issues in which matters of administrative procedure and internal agency management cannot be separated easily from substantive policy matters. For example, there is currently a policy debate about the merits of promoting "safer" pesticides, yet this substantive policy decision is interwoven with the possibilities of adopting streamlined, "fast track" procedures for registering such pesticides. Similarly, the broader problem with delay in OPP's reregistration program may require consideration of substantive provisions for administrative penalties by which OPP can better police the timeliness and quality of registrants' data. To the extent this Report urges reform of provisions that might be said to intermix substance and procedure, it attempts to focus analysis on procedural measures and leave untouched as much as possible the related substantive matters of policy.

Before analyzing specific reform measures that might be made to FIFRA's cancellation, reregistration, suspension, and registration procedures, Part II of this Report seeks to explain the regulatory task with which EPA has been charged in FIFRA and the procedural framework with which EPA approaches this task. The Report takes up in Part III the regulation of existing pesticides and questions of streamlined reregistration, suspension, data management, and cancellation procedures. In Part IV, the Report takes up regulation of new pesticides and analyzes procedures that can accommodate a commitment to register and encourage safer pesticides. The Report has been written to allow readers sufficiently versed in the history and design of FIFRA to consult Parts III and IV.

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[19] The Report does mention in passing, however, how an open-ended or statutorily-specified definition of "negligible risk" might affect the constitutional due process analysis of streamlined cancellation procedures. *See* text *infra* at note 170.

II. Pesticide Regulation Under FIFRA[20]

At the core of federal pesticide regulation is a tale of two statutes, the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") and, secondarily, the Federal Food Drug and Cosmetic Act ("FFDCA"). Under FIFRA, no one may distribute or sell for a specific use a "pesticide"—defined broadly to include any insecticide, herbicide or other substance for the control of a "pest"[21]—unless the pesticide has been "registered" with EPA for that specific use.[22] EPA will register new pesticides and "reregister" older ones[23] so long as the pesticides are designed to accomplish their intended effects without causing "unreasonable adverse effects on the environment,"[24] a standard defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of [the pesticide's] use."[25]

If a pesticide's use is expected to cause residues to remain in or on food, EPA will not register that use under FIFRA unless it has also granted a residue "tolerance" under FFDCA.[26] Tolerance-setting is governed by FFDCA Sections 408 and 409. Section 408 governs tolerances for "raw" agricultural commodities such as milk and fresh produce.[27] Like a pesticide's registration under FIFRA, a Section 408 tolerance is granted on the basis of a risk-benefit calculus;[28] accordingly, EPA may, and has, granted tolerances for residues of oncogenic pesticides (those pesticides which can cause tumors in laboratory test animals under certain conditions) when the Agency believes that the health risks to human beings are nevertheless relatively small.[29] Section 409 governs tolerances for "processed" foods such as applesauce.[30] In contrast to the risk-benefit standard for raw commodity tolerances, Section 409 is governed by the special decisional rule of the so-called "Delaney Clause" which prohibits any pesticide residues in processed foods "found to induce cancer in humans or animals."[31]

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[20] Much of the historical material in this Part of the Report is taken from Hornstein, *supra* note 18.

[21] *See* 7 USC §136(u) (the term "pesticide" means "any substance...intended for preventing, destroying, repelling, or mitigating any pest" and "any substance...intended for use as a plant regulator, defoliant, or desiccant"). *See also id.* 136(t) (the term "pest" means "any insect, rodent, nematode, fungus, weed...or any other form of terrestrial or aquatic plant or animal life or virus, bacteria or other micro-organisms [except those on living humans or animals]").

[22] *Id.* 136a(a).

[23] In 1972, FIFRA was amended to require the "reregistration" of previously registered pesticides under contemporary standards of "unreasonable risk." *See* Pub. L. No. 92-516, as amended by Pub. L. No. 94-140, Section 4.

[24] 7 USC §136a(c)(5)(C),(D) (1988).

[25] *Id.* Section 136bb.

[26] *See* 21 USC §346a, 348 (1988); 40 CFR §152.112(g)(1991). EPA expresses tolerances as parts per million of pesticide residue in or on the food being evaluated.

[27] *See* 21 USC §346a(a).

[28] *See id.* (Administrator shall establish tolerances "to the extent necessary to protect human health" after giving "appropriate consideration" to the need for the production of an adequate, wholesome and economical food supply); Food Safety Amendments of 1989: Hearings on H.R. 1725 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 133-38 (1989) (testimony of EPA Acting Deputy Director John A. Moore) (EPA uses a subjective risk-benefit analysis for each case).

At the core of modern pesticide regulation under both statutes is the FIFRA reregistration program. Most of the 50,000 pesticide products now on the market derive from some 640 active ingredients that were registered under FIFRA on the basis of data sets that do not now meet contemporary risk assessment standards. The National Academy of Sciences estimated in 1987 that many of these older pesticides account for the lion's share of the contemporary risks from pesticides, under worst-case assumptions accounting for as many as 20,000 annual cases of pesticide-induced dietary cancer among consumers.[32] Other data indicate that these older pesticides may cause additionally between 80,000 and 300,000 occupational injuries (and as many as 1,000 deaths) annually among farmworkers.[33] Reregistration seeks to reevaluate these older pesticides under contemporary risk assessment standards.

In 1988, Congress adopted amendments to FIFRA designed specifically to expedite and regularize the reregistration process. Under the revamped statutory program, EPA is to complete in five "phases" by 1997 the complete reregistration of all active ingredients that were first registered prior to November 1, 1984.[34] Phase 1 serves as a rough priority-setting device through the publication of four "lists" of pesticides—Lists A, B, C, & D— with pesticides in List A involving those products for which EPA had already developed interim registration standards and tending to involve those pesticides most commonly used on food. In Phase 2, registrants had to advise EPA whether they intended to seek reregistration and to identify any missing or inadequate data. In Phase 3, registrants had to reformat and summarize previously submitted data and to develop data necessary to fill existing data gaps. In Phase 4, EPA reviews all Phase 3 submissions and issues "data call-ins" for missing or inadequate data. In Phase 5, EPA is required within one year after all data have been submitted to determine whether an active ingredient is "eligible" for reregistration. EPA may require further data for specific products made from this active ingredient but, promptly upon the submission of such data, the Agency must determine whether a pesticide should be reregistered.

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[29] *See* National Academy of Sciences, Regulating Pesticides in Food: The Delaney Paradox (1987).

[30] *See* 21 USC §348 (1988). EPA, however, does not require a Section 409 tolerance for processed foods containing pesticide residues at or below the Section 408 tolerance level.

[31] The Clause is named after Representative James Delaney of New York who chaired extensive hearings on the safety of pesticides over a two-year period between 1950 and 1952. *See* Hearings Before the House Select Comm. To Investigate the Use of Chemicals in Foods and Cosmetics, 81st Cong., 2d Sess. and 82nd Cong., 1st & 2d Sess. (1950-1952) (popularly known as the "Delaney Committee" hearings). There are actually three "Delaney Clauses" in different sections of the FFDCA. *See* 21 USC §348(c), 367(b)(5)(B), 360b(d)(1)(H). Although the Clause seems unequivocally to allow no room for consideration of a carcinogen's dose, *see* Richard A. Merrill, Regulating Carcinogens in Food: A Legislator's Guide to the Food Safety Provisions of the Federal Food, Drug, and Cosmetic Act, 77 MICH. L. REV. 171, 181 (1978), EPA had, between 1988 and the Ninth Circuit's decision in Les v. Reilly, adopted a de minimis standard that allowed the agency to avoid the zero-risk impact of the Delaney Clause where the Agency believed the human dietary risk from a pesticide residue is "at most negligible," *see* Regulation of Pesticides in Food: Addressing the Delaney Paradox Policy Statement, 53 Fed. Reg. 41104 (1988).

[32] *See* National Academy of Sciences, *supra* note 29, at 74 (if worst case assumptions are valid, there would be an increased risk of 5,800 cancers per million people over a 70-year lifetime, translating into 1.4 million additional cases for the current population or 20,000 additional cases yearly). *See also* Meta-Analysis of Studies Indicates Higher Risks of Certain Cancers in Farmers, 16 Chem. Reg. Rep. (BNA), No. 26, at 1153 (Sept. 25, 1992) (National Cancer Institute's new meta-analysis of epidemiological studies suggests that the "rising rates for some tumors" among the general population may in fact be due to consumer exposure to agricultural pesticides).

[33] *See* OSHA Field Sanitation: Final Rule, 52 Fed. Reg. 16,050 (1987) (citing Bureau of Labor Statistics data); R. Wassertom & R. Wiles, Field Duty: U.S. Farmworkers and Pesticide Safety 3 (1985).

If, in the course of reregistration or otherwise, new information leads EPA to suspect that a registration can no longer be supported, it may begin proceedings to "cancel" the pesticide's registration, either in whole or as to specific applications.[35] EPA may also "suspend" a pesticide's registration during the pendency of cancellation proceedings if necessary to prevent an imminent hazard to the public.[36] Additionally, EPA may suspend a pesticide when registrants fail to fulfill their data obligations imposed in the reregistration process. Any registration suspended for data problems, however, must be fully reinstated upon the data's (untimely) submission. Registrants to whom EPA issues a Notice of Intent to Cancel or registrants of pesticides that EPA seeks to suspend because of "imminent hazards" are allowed to demand formal evidentiary hearings.

To understand fully the basic structure of pesticide regulation, it is important to appreciate the historical and practical link between reregistration and cancellation. In 1972, FIFRA was reconceived as an environmental protection statute under the direction of EPA. Soon after the 1972 FIFRA amendments, EPA's Office of General Counsel ("OGC") successfully adjudicated a series of resource-intensive cancellation proceedings against such highly visible organochlorine pesticides as DDT, Aldrin/Dieldrin, Heptachlor/Chlordane, and Mirex.[37] To simplify their evidentiary tasks in these proceedings, OGC attorneys shifted from an open-ended inquiry into all of a pesticide's risks and benefits into a more focused "formula" that highlighted three factors: animal data showing the pesticide's carcinogenicity, evidence of widespread human exposure, and evidence of increasing pest resistance to the pesticide (from which OGC attorneys could downplay the pesticide's benefits).[38] OGC's success in these proceedings, however, only framed the immensity of EPA's larger regulatory task: the enormous effort required by the handful of cancellation proceedings hardly made a dent in the Agency's statutory duty to reregister the entire inventory of 50,000 existing products, containing hundreds of active ingredients.[39]

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[34] *See* 54 Fed. Reg. 18,076 (1989).

[35] *Id.* 136d(b) (1988). *See* Environmental Defense Fund v. EPA, 564 F.2d 528, 532 (D.C. Cir. 1972).

[36] 7 USC §136d(c).

[37] *See* MacIntyre, *supra* note 18, at 205.

To simplify their task in reregistration, scientists at EPA's Office of Pesticide Programs borrowed the streamlined analytical approach pioneered by OGC attorneys in the early cancellation hearings and crafted an innovative regulatory device, the "rebuttable presumption against registration" ("RPAR") for use in EPA's reregistration program. If a pesticide ingredient was found to be oncogenic in test animals, it automatically triggered a RPAR process under which the burden of proof formally shifted to manufacturers to submit data rebutting the presumption to avoid Agency issuance of a Notice of Intent to Cancel.[40] If a pesticide's data did not trigger RPAR, and all necessary data were available and adequate, the pesticide became eligible for reregistration. The RPAR was viewed as a promising regulatory initiative that "proffered a substantial reduction of [the reregistration] caseload by providing a screening device that would rapidly isolate, and focus available evaluation capacity on, the worst chemicals while the safer ones underwent pro forma reregistration."[41]

In 1978, FIFRA was amended to allow for "Special Reviews" (a new term given to RPARs) when EPA could base such review on a "validated test or other significant evidence of unreasonable adverse risk."[42] The 1978 Amendments also allowed EPA to shift its reregistration focus from the 50,000 end products to the more manageable number of active ingredients,[43] and gave EPA "data call-in" authority by which the Agency could require registrants to provide data in support of a pesticide's reregistration.[44] During the late 1970's, EPA issued approximately 35 RPARS, many of which dragged on interminably.[45] In 1985, EPA revised its risk criteria for initiating Special Reviews to replace the original RPAR "triggers,"[46] a revision designed to "afford the Agency greater flexibility in evaluating potential risks" and initiating Special Review.[47]

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[38] *Id.* at 216.

[39] *See* Staff Report to the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, The Environmental Protection Agency and the Regulation of Pesticides, 94th Cong., 2d Sess. 11 (1976) (35,000 pesticide products had been registered under federal law and 15,000 more under various state laws).

[40] *See* 40 CFR §162.43(f)(1)(i)(A)(3) (1976).

[41] *See* MacIntyre, *supra* note 18, at 215-216.

[42] *See* 92 Stat. 826. This requirement, known as the "Grassley-Allen Amendment," was enacted out of concern for the "indictment-like characteristics" of the RPAR process, a concern which also led to the shift in terminology from "rebuttable presumption against registration" to "special review." *See* John D. Conner, Jr., et al., Pesticide Regulation Handbook 171 n.14 (3d ed. 1991).

[43] *See* 92 Stat. 819. There were in 1978 some 800 active ingredients, a number that has since been reduced to about 650 in 1993.

By the mid-1980's, the Special Review process was preceded by private notification from OPP to registrants (in a document known as a "Grassley-Allen" notice) when OPP suspected a problem with a pesticide under EPA's revised risk criteria. If registrants could provide evidence to disabuse OPP of its suspicions, the Agency would publish in the Federal Register its reasons for not initiating Special Review.[48] If the Agency's concerns remained, OPP would publish in the Federal Register a Notice of Special Review, called "Position Document 1" ("PD 1") describing the risk criteria involved, the assumptions and data used in the Agency's analysis, and the strength of the Agency's conclusions.[49] EPA would also invite public comment and additional information on the pesticide. Following release of its PD 1, OPP would receive public comment, sometimes meet with interested parties, and occasionally hold informal public informational meetings.[50] Thereafter, the Agency would typically issue a "Position Document 2/3" (PD 2/3") announcing measures short of cancellation that address the risks of concern, often involving such measures as additional label warnings, use precautions, and protective clothing requirements.[51] EPA would solicit public comments on its PD 2/3 determination and also refer its tentative decision to the Secretary of Agriculture and to the FIFRA Scientific Advisory Panel for comment.[52] Following further input, OPP would announce its final determination in a "Position Document 4" ("PD 4").[53] Sometimes the PD 4 determination was accompanied by a Notice of Intent to Cancel, either because the risk reduction measures were inadequate to prevent "unreasonable risk" or because the Agency sought to use the cancellation process to make these risk reduction measures legally enforceable. EPA's regulations specifically allow EPA to collapse the

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[44] *See* FIFRA Section 3(c)(2)(B); *see also* Robert Perlis, The Push for Data on Existing Pesticides, 4 NAT. RES. & ENVT. 6, 7 (1990).

[45] *See* Pesticide Regulation Handbook, *supra* note 42, at 171.

[46] 50 Fed. Reg. 49,003 (1985).

[47] *Id.* at 49,005; *see* Pesticide Regulation Handbook, *supra* note 42, at 172.

[48] *See* 40 CFR §154.23. This notice also afforded interested persons a thirty-day comment period prior to an announcement by EPA of its final decision not to initiate Special Review.

[49] *See* 40 CFR §154.25(c).

[50] *See* 40 CFR §154.26 (public comment), 154.27 (meetings with interested parties), 154.29 (informational public meetings).

[51] *See* Pesticide Regulation Handbook, *supra* note 42, at 176.

[52] *See* 40 CFR §154.31(b).

[53] *See* 40 CFR §154.33.

Special Review process to expedite decisionmaking,[54] and make it clear that cancellation proceedings may be initiated by EPA even in the absence of Special Review.[55]

Because Special Review itself had become so bureaucratic and time consuming,[56] however, EPA has since the late 1980's avoided the Special Review process entirely. Although several pesticides remain in the process,[57] the Agency has not initiated Special Review for any pesticide since 1988.[58] Instead, OPP has turned to informal negotiations with registrants to obtain risk reduction measures.[59] A recently completed but unreleased audit of the Special Review process by EPA's Inspector General has reportedly called this shift away from Special Review a "significant change in the regulations."[60] OPP's Acting Deputy Director has stated that informal label negotiations speed up the process of interim risk reduction "but the downside is that it is not as open as I'd like to see it."[61]

III. Regulating Existing Pesticides: Reforming Reregistration, Suspension, Data Management, and Cancellation Procedures

A. The Substantive Tensions Underlying Pesticide Regulation

However critical one might be of FIFRA's statutory design or EPA's record in implementation, it is intellectually dangerous to approach procedural reform without an appreciation of the genuine substantive difficulties of pesticide regulation. Underlying everything is the fact that pesticides, whatever their risks, can also have benefits. Even those who believe these benefits to be overstated, generally concede that a residuum (and often a quite significant residuum) of benefits from pesticides cannot be ignored.[62] Policy analysis can quickly become complicated when one realizes that these benefits may not only be measured in productivity gains, lower food prices, and increased grower profits—which one might plausibly argue should be trumped by concern for public health and environmental gains— but may also be measured in terms of public health benefits (from increased fruit and vegetable consumption due to lower prices) and environmental gains (more land may be available for wildlife habitat when agricultural land is farmed intensively)—depriving the analyst of easy resort to a blanket preference for public health and environmental values.

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[54] *See* 40 CFR §154.34 (allowing for the Notice of Special Review and PD 2/3 to be combined).

[55] *See* 40 CFR §154.34(a).

[56] *See* notes 8-10 *supra* (Special Reviews of fungicide Captan took nine years, of fungicides containing cadmium ten years, and of the fungicides EBDCs, over 12 years).

[57] As of March 1992, eight pesticides remained in Special Review. *See* U.S. Envtl. Protection Agency, Status of Pesticides in Reregistration and Special Review, 9-50 (Mar. 1992).

[58] *See* EPA Actions in Special Review of Amitrole May Have Implications for Risk Assessments, 15 Chem. Reg. Rep. (BNA), No. 36, at 1359 (Dec. 6, 1991) (the last pesticide put in Special Review was dichlorvos in 1988).

[59] *See* Special Analysis: Special Review Process for Potentially Harmful Pesticides Sidetracked While EPA Negotiates Side Deals With Registrants, 17 Chem. Reg. Rep. (BNA) 1005 (August 27, 1993).

[60] *Id.* at 5.

[61] Acting OPP Deputy Director Dan Barolo, quoted in Special Analysis, *supra* note 59, at 3.

It is not, of course, impossible to simplify the complications that can arise from attempting to calculate and weigh all risks against all benefits. The Clinton Administration, for example, has proposed minimizing benefits analysis in setting FFDCA tolerances: tolerances instead would be set to assure no more than "negligible risks" from pesticides (defined to mean a "reasonable certainty of no harm" which, in turn, the Clinton Administration would further define for carcinogenicity as no more than a conservatively calculated one-in-one-million lifetime risk of cancer) and benefits could be considered to relax this target temporarily only when cancellation of a pesticide due to its lack of an FFDCA tolerance would "threaten to disrupt the food supply."[63] This Report takes no position on the desirability of truncating benefits analysis, viewing that decision more as a substantive policy judgment than a procedural device.

But even with a truncated analysis focused mainly on the "risk" side of the equation, the underlying difficulties in policy analysis remain evident. For example, there remains the question of which risk "end-points" to measure: neurotoxicity as well as carcinogenicity; risks to especially susceptible subgroups such as infants and children as well as risks to the general population; occupational risks to farmworkers as well as dietary risks to consumers; risks to wildlife and habitats as well as risks to people. Currently, EPA focuses on 15 different endpoints.[64] Then, there are the difficulties of making incommensurable trade-offs among these risks. EPA's decision to cancel many uses of the nematicide ethylene dibromide ("EDB"), for example, has been criticized as preventing a relatively small dietary risk to consumers at the expense of forcing the use of substitute pesticides creating a more significant occupational health risk to applicators.[65]

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[62] *Compare* David Pimentel et al., Environmental and Economic Impacts of Reducing U.S. Agricultural Pesticide Use, in Handbook of Pest Management in Agriculture (1991) (finding that if 50 percent of pesticides now used in American agriculture were replaced by nonchemical control techniques, crop yields would not decline and food prices would rise less than one percent) with David Pimentel et al., Benefits and Costs of Pesticide Use in U.S. Food Production, 28 BIOSCIENCE 772, 781 (1978) (for many crops, pesticides increase yields and reduce labor costs, with aggregate estimates of productivity gains indicating a 400% rate of return on the pesticide dollar).

[63] *See* Benefits Tossed Out of Risk Analysis, Delaney Repeal Sought in Reform Package, 17 Chem. Reg. Rep. (BNA), No. 26, at 1115 (Sept. 24, 1993).

[64] *See* Special Analysis *supra* note 59, at 2 (quoting OPP Acting Deputy Director Dan Barolo) (OPP focuses on 15 different endpoints, with the list of endpoints "still growing…[to include] risks involving ground water, acute dietary effects, cancer, avian risks related to granular pesticides…[and the] risks of destroying a critical habitat of any threatened or endangered species…. EPA concerns can be

Compounding these difficulties is the scientific complexity of the underlying risk assessments. A review of the reregistration program by the General Accounting Office in May 1993 noted that "over 100 studies may be required to provide the information EPA needs to assess a food-use pesticide."[66] Moreover, the meaning of each of these studies may be open to legitimate interpretation. The National Academy of Sciences in 1983 identified almost 50 decisional points in risk assessments that may each present assessors with "inference options" requiring a choice among several plausible scientific judgments about uncertain data or theoretical connections.[67] Even though growing experience with risk analysis might be expected to make the science of risk assessment less soft as to some endpoints, the regulators' inevitable concern with new endpoints will continually raise serious interpretational difficulties. OPP's Acting Deputy Director noted in August 1993 that the National Academy of Sciences' June 1993 report on dietary risks to infants and children will make studies on neurotoxicity and immunotoxicity relevant to and more prevalent in pesticide reregistration, yet "no two scientists in the free world agree on how to deal with these endpoints."[68]

And compounding the scientific difficulties of risk assessment are structural concerns about the integrity of the raw data on which these assessments are based. OPP depends on health, safety, and environmental data developed by registrants themselves (or, more commonly, by the laboratories with which registrants contract). Yet because these data become public upon their

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triggered not only by agency studies, but also by studies of independent groups such as the National Toxicology Program or by the National Cancer Institute").

[65] *See* William B. Havender, EDB and the Marigold Option, Jan.-Feb. 1984 REGULATION 13.

[66] U.S. General Accounting Office, *supra* note 14, at 8.

[67] *See* National Research Council, National Academy of Sciences, Risk Assessment in the Federal Government: Managing the Process 29-31 (1983). Professor Mary Lyndon gives three examples of such inference options:

> (1) What relative weights should be given to studies with different results? For example, should positive results outweigh negative results if the studies that yield them are comparable?....
>
> (2) Should evidence on different types of responses be weighted or combined (e.g., data on different tumor sites and data on benign versus malignant tumors)?....
>
> (3) How should physiologic characteristics be...factored into the dose-response relation? For example, is there something about the study group that distinguishes its response from that of the general population?

Mary Lyndon, Risk Assessment, Risk Communication and Legitimacy: An Introduction to the Symposium, 14 COLUM. J. ENVTL. L. 289, 291 (1989).

[68] Special Analysis *supra* note 59, at 4.

submission to EPA and cannot really be capitalized upon by registrants,[69] there is no real market incentive for registrants to produce especially good data and some obvious market incentives not to produce especially damning data.[70] This is not to suggest that all registrants will falsify data, although it is worth noting that OPP has been rocked more than once by falsification scandals,[71] but it is to argue that registrants have every incentive to put the best spin on their data within the broad scope of plausible scientific disagreement over the design and interpretation of risk assessment studies.

The predictable effect of this structural problem is that the adequacy of raw data becomes a constant and compounding difficulty for the entire risk assessment enterprise. An internal EPA audit in the mid-1970's on the data underlying 23 randomly selected pesticides found that "all but one of the tests reviewed were unreliable and inadequate to demonstrate safety."[72] In congressional hearings on EPA's suspension of heptachlor/chlordane in 1976, there were uncovered "innumerable examples of sloppy and inaccurate data in addition to abundant evidence that much of the pathology data as submitted by industry was based upon the diagnostic opinion of pathologists...whose views were at best extremely conservative."[73] In 1990, the General Accounting Office expressed concern that as much as 60 percent of the disinfectants data on antimicrobial pesticides in one system may be inaccurate or incomplete.[74] In 1991, a report from EPA's Inspector General reported problems with data accuracy and completeness in another of the databases at the National Computing Center used by EPA to make pesticide reregistration decisions.[75] In 1992, internal agency reports by EPA's Special Review and Reregistration Division indicated that high rejection rates for data inadequacy across the reregistration program had become one of the most significant reasons for program delay.[76]

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[69] A caveat to this statement is that registrants can, under FIFRA, seek payment from the producers of generic or "me-too" producers who rely on the registrants' original data, after all applicable patents on the original product have expired, for the purpose of registering copycat products. *See* FIFRA Section 3(c)(1)(D)(ii); Thomas v. Union Carbide, 473 U.S. 568 (1985) (upholding constitutionality of data compensation procedures).

[70] *See* Paul Portney, Toxic Substance Policy and the Protection of Public Health, in Resources for the Future, CURRENT ISSUES IN U.S. ENVIRONMENTAL POLICY 138 (Paul R. Portney ed., 1978) (Because there is no active market for good information, government regulators are peculiarly dependent on the regulated firms themselves for data generation. This creates numerous incentives for firms to choose testing procedures most likely to shed favorable light on the substances they wish to market); Kenneth Arrow, Economic Welfare and the Allocation of Resources for Invention, in National Bureau of Econ. Research, The Rate and Direction of Inventive Activity 609, 615 (1962) (the market for good information is further reduced because purchasers do not know its value until it has been produced, thereby reducing incentives for investment in information-producing entities).

[71] Most recently, in May 1993 EPA issued a data call-in to 13 registrants to replace over 290 studies that had been done by Austin, Texas-based Craven Laboratories, Inc., after testimony from twelve former employees of the company admitting wrongdoing caused the onset of a federal investigation for alleged falsification of data. *See* EPA Seeks Data on 20 Chemicals to Replace Studies Done by Craven Labs, 17 Chem. Reg. Rep. (BNA), No. 7, at 286 (May 14, 1993). An even more major scandal involved Industrial Biotest ("IBT"), the nation's largest chemical testing firm, which in 1976 caused OPP to halt all registration action after IBT was found to have falsified outright registration data for over 200 pesticides. *See* Staff of Senate Comm. on the Judiciary, 94th Cong., 2d Sess., Report on the Environmental Protection Agency and the Regulation of Pesticides 4 (Comm. Print 1976) ("[S]everal years of regulatory effort will have to be completely reexamined, substantially redone, and fundamentally redirected if the Congress and the public are to have a reasonable basis to conclude that today's pesticides do not pose a significant risk to human health and the environment").

[72] William E. Reukauf, Regulation of Agricultural Pesticides, 62 IOWA L. REV. 909, 917 (1977), citing Joint Hearings on Safety Testing of Pesticides in Nongovernment Labs Before the Subcomm. on Health of the Senate Labor and Public Welfare Comm. and the Senate Judiciary Comm., 94th Cong., 2d Sess. 619-20, 646, 649 (1976) (testimony of Melvin D. Reuber, M.D.).

It is no answer to argue simply that EPA should suspend or cancel all pesticides whose registrants submit inadequate data. Because then, as the data are not known, there is the chance that the Agency's action could do more harm than good in terms of either creating more public health and environmental risks in the absence of the pesticide (due to user shifts to even worse substitute products) or foregoing benefits whose value outweighs whatever risks might be prevented.

We come, therefore, full circle to the underlying difficulties of policy choices on risks and benefits in regulating pesticides. EPA's job, however, is to square the circle as best it can. In the following section, this Report uses several regulatory case histories to illustrate how EPA goes about its job and how inadequate procedures can unnecessarily complicate an already demanding regulatory task.

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[73] EPA's Implementation of the Pesticides Control Act: Hearings Before a Subcomm. of the House Comm. on Government Operations, 94th Cong., 2d Sess. 34-35 (1976) (letter from Jeffrey H. Howard et al. to Hon. William S. Moorhead).

[74] U.S. General Accounting Office, Disinfectants: Concerns Over the Integrity of EPA's Data Base (Sept. 21, 1990).

[75] *See* Office of the Inspector General, EPA, Audit Report No. E1EFF1-05-0117-1100378, Inert Ingredients in Pesticides (Sept. 27, 1991).

[76] *See* Lowered Data Rejection Rate Needs to Meet 2002 Reregistration Target, Chem. Reg. Daily (BNA) (Aug. 4, 1992), available in LEXIS, BNA Library, BNACRD file (EPA openly worrying that its data rejection rate is "too high" and can compromise reregistration target dates of 1997 established in the 1988 FIFRA Amendments or even the Agency's own extended target date of 2002); *see also* U.S. E.P.A., Pesticides and Toxic Substances Report No. H-7508W, Pesticide Reregistration Progress Report 5 (April 1992) ("rejected studies pose the most significant potential for delays in the production of Registration Eligibility Documents").

B. Procedural Case Histories

1. Reregistration and Negotiated Label Changes on Atrazine[77]

Atrazine, an herbicide used to control weeds of such crops as corn, sugarcane, and wheat, is among the two or three most heavily used pesticides in the country. First registered for use in 1959, EPA had by 1983 completed its first comprehensive reassessment of atrazine under the Agency's pre-FIFRA '88 reregistration program. Under that program, EPA prepared a document called a "reregistration standard" that summarized available data, required submission of additional data, and outlined other conditions registrants had to meet for reregistration. In its 1983 standard, EPA concluded that the existing data (129 studies) were insufficient to evaluate the pesticide's long-term health and environmental effects, and requested the registrants to fill 48 data gaps, with the last study to be due November 1987. Especially concerned about data indicating atrazine's potential to contaminate groundwater, EPA also required in its 1983 standard that labels on products containing atrazine warn of potential groundwater contamination and advise that atrazine not be used on certain soils. EPA informed registrants at the time that it was unsure whether this label requirement would resolve the Agency's concerns about groundwater.

Studies generated after the 1983 standard, along with other data, indicated not only that atrazine could contaminate groundwater but also that it could cause cancer and heart disorders. As a result, in 1988, EPA informed registrants that the Agency was considering the initiation of Special Review and requested additional data. In response, one registrant contested the Agency's characterization of the magnitude of the risks and proposed several voluntary measures to reduce exposure (restricting use to certified workers, limiting use on certain crops, and requiring workers to wear protective clothing). Although EPA welcomed these measures, it issued a data call-in in November 1988 requiring the submission of 35 additional studies. In September 1989, atrazine's primary registrant asked to meet with EPA to discuss in more detail EPA's concerns about heart disorders detected in an earlier dog study. At some point thereafter, EPA decided not to initiate Special Review because it had been persuaded that a better interpretation of the dog study made risks of possible cardiac problems among atrazine users less than it first appeared because EPA used too low an exposure threshold.

In September 1989, EPA completed its second comprehensive reassessment of atrazine under its registration standards program. The Agency's second standard concluded that the existing data (143 studies) were insufficient to evaluate the pesticide and identified an additional 51 studies that registrants needed to conduct. EPA never implemented its second standard, however, because its reregistration program had been sufficiently changed by the FIFRA '88 amendments.

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[77] Much of the information in this case study is drawn from U.S. General Accounting Office, *supra* note 14, Appendix II ("Case Study: Reassessment of Atrazine").

In September 1990, under the accelerated reregistration program of FIFRA '88, EPA issued a data call-in requiring most of the studies that had been identified in 1989. The last study was to be due in August 1994. As of November 1992, however, there were still 45 studies outstanding. As of May 1993, EPA was reconsidering placing atrazine in Special Review within the year, although it recognized that reregistration could not be completed for any uses that were the subject of an ongoing Special Review until that Review was completed.

2. Reregistration of Chlorothalonil[78]

Chlorothalonil is a fungicide used on crops such as peanuts, tomatoes, and potatoes. Originally registered in 1966, EPA completed its first registration standard for chlorothalonil in 1984, at which time it identified the fungicide as a possible cause of cancer and as a pesticide that leaches into groundwater. The standard also concluded that the existing data (135 studies) were insufficient to evaluate the pesticide's long-term effects and identified studies needed to fill 71 data gaps, with the last study to be due by December 1985. In the interim, EPA decided to minimize additional public exposure by restricting the registration of any new uses of chlorothalonil.

EPA completed its second registration standard for chlorothalonil in September 1988, at which time it confirmed the fungicide as a probable human carcinogen and determined that groundwater monitoring studies were needed. The carcinogenicity classification had been reached in 1987 after considering advice from EPA's Scientific Advisory Panel ("SAP") that recommended that the agency defer classification until the latest data had been fully evaluated. That evaluation was completed by May 1988 and an EPA peer review committee affirmed the carcinogenicity classification. EPA identified new studies that were needed to fill 62 data gaps and continued refusing any registrations for new uses of chlorothalonil until the new data were developed and evaluated.

In October 1988, EPA notified the public of its second draft registration standard and received voluminous comments from three affected registrants. EPA responded to each of the points raised by these commenters, even those to which it had previously responded in informal discussions, a time-consuming effort that delayed drafting of the final standard to March 1990. Although EPA planned to issue data call-ins ("DCIs") as part of the second standard, actual issuance of the DCIs was delayed by eight months due to review of the draft DCI by the Office of Management and Budget ("OMB"). According to EPA officials, the requirement that OMB review and clear every proposed data request was time-consuming not only because of delay on OMB's part but also because the process imposed additional work on EPA. The DCIs were issued in July and September 1991, with the last study to be due by August 1995.

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[78] Much of the information in this case study is taken from U.S. General Accounting Office, *supra* note 14, Appendix I ("Case Study: Reassessment of Chlorothalonil").

In March 1992, a registrant requested waivers for at least ten studies, a request that the Agency had not been able to fully evaluate as of February 1993. To the extent EPA denies the requests, it will probably grant the registrant requests for time extensions for an additional two years to complete the studies.

3. Label Negotiations on an Unanticipated Problem: Mercury in Paint

Although household paints do not require registration as a pesticide, to the extent that paint formulators add an ingredient such as mercury to prevent mildew, mercury producers must obtain a registration for that use from EPA and follow any label requirements imposed by EPA's pesticide office. In September 1989, a four-year-old boy living with his family in Michigan was hospitalized with acrodynia, a rare form of mercury poisoning. All members of the boy's family were also found to have unusually high mercury levels after their home had been painted, and the most likely cause was the use of mercury as an ingredient in the paint that had been used. At the time, approximately 1,800 paint companies "from Sherwin-Williams to your local paint company" used mercury-containing compounds when formulating their products.[79] The incident received national media attention and sparked nationwide concern about potential mercury poisoning from paint.

Spurred on by pressure from OMB and the White House to get a handle on the problem, EPA sent a survey letter in March 1990 to 1500 paint and coating formulators, began to identify data gaps in toxicology and risk exposure in the registration file for mercury, began to consider issuing an emergency suspension of mercury for use in indoor paints, and began to "prepare for cancellation hearings."[80] At the time EPA began this flurry of activity, mercury's FIFRA registration allowed approximately 330 parts-per-million of mercury to be added to paint as a pesticide; the paint used on the family house in Michigan was tested to have over 900 ppm of mercury.[81] In April 1990, the federal Centers for Disease Control recommended a ban on mercury biocides in paint.

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[79] *See* EPA Investigating Mercury in Paint, 13 Chem. Reg. Rep. (BNA), No. 46, at 1499 (Feb. 23, 1990).

[80] *See* Mercury in Paint Action Expected by Labor Day, 14 Chem. Reg. Rep. (BNA), No. 6, at 236 (May 11, 1990).

By June 1990, following informal negotiations with EPA, virtually all paint manufacturers agreed to eliminate the use of mercury biocides in interior paint and coatings. New label language submitted by some producers restricted mercury biocides to adhesives, drywall compounds, and acoustical plasters; reduced the maximum concentration of mercury to 120 ppm; limited use to products labeled with cautionary statements; and stated when the sale, distribution, and use of the products would be unlawful.[82]

In October 1990, Edwin Tinsworth, former Director of the Special Review and Reregistration Division in OPP, cited the example of the "voluntary fixes" achieved in the mercury-in-paint situation as an example of getting voluntary action in months rather than the years that would have been necessary for regulatory action.[83]

4. Reregistration, Special Review, Science Policy Disputes, and Negotiated Label Changes on Amitrole

Amitrole is an herbicide now used predominantly to clear weeds on non-crop sites such as rights-of-way. In 1984, on the basis of a registration standard which identified amitrole's carcinogenicity, EPA issued a PD 1 document and placed the pesticide in Special Review. Soon thereafter, both aquatic uses and forestry uses were voluntarily canceled. EPA, at the time Special Review was initiated, identified data gaps and issued DCIs to have the gaps filled. After fielding requests for data waivers and time extensions, EPA issued a PD 2/3 on September 30, 1985. The basis for the Agency's concern was evidence showing thyroid and liver cancers in mice.[84]

Between 1985 and 1989, however, OPP's regulation of amitrole became caught up in a science policy question on modeling carcinogenic effects. As a general matter, EPA followed a conservative model that assumed that there were no safe thresholds for exposure to a pesticide that caused carcinogenic responses in test animals. In 1986, however, some risk assessors became attracted to models that assumed that there were such safe thresholds (and which therefore would predict less risk from exposure). The data on thyroid cancers were particularly consistent with this model, which made amitrole a test case over which the risk assessment debate swirled. The question was complicated, however, by the fact that amitrole also induced liver cancers in mice, a form of carcinogenic response that did not comport well with the threshold model. In the end, EPA refused to apply its threshold model in its Special Review of amitrole, in part because the registrant simply could not provide EPA with enough "mechanistic data" to give the Agency confidence that a threshold model would better represent amitrole's risk than the Agency's default no-threshold model. The problem, said one of the advocates for the threshold model, is that "EPA has not determined with any one chemical that enough is enough."[85]

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[81] *See* EPA Investigating Mercury in Paint; Substance May Pose Unreasonable Risk, 13 Chem. Reg. Rep. (BNA), No. 46, at 1499 (Feb. 23, 1990).

[82] *See* Registration for Mercury in Indoor Paint, Plaster Canceled at Request of Manufacturer, 14 Chem. Reg. Rep. (BNA), No. 24, at 956 (Sept. 14, 1990).

[83] *See* OPP Director Edwin Tinsworth Leaves After 22 Years in Federal Government, 14 Chem. Reg. Rep. (BNA), No. 30, at 1106 (Oct. 26, 1990).

[84] *See* EPA Actions in Special Review of Amitrole May Have Implications for Risk Assessments, 15 Chem. Reg. Rep. (BNA), No. 36, at 1359 (1991).

Dislodged from the science policy debate, EPA issued in 1990 a DCI requesting new worker studies to determine better the possibility of occupational exposure to the herbicide. Although Rhone-Poulenc, amitrole's primary registrant, contended that the worker studies were unnecessary, EPA maintained its request for data for most forms of amitrole applications, but did allow Rhone-Poulenc to substitute existing studies on bromoxynil for others.

In February 1991, however, at an EPA management retreat, OPP officials were said to have come away with a "new philosophy" that informal negotiations with registrants over voluntary risk reduction measures were preferable to Special Review.[86] OPP officials acknowledged that one of the benefits of Special Review was an "open and responsive" procedure based on public participation rules adopted by the Agency in 1985, and determined to think of a way to open up the negotiation process to more widespread public involvement. Allan Abramson, former Acting Director of the Special Review and Reregistration Division, stated that "Special Review is not an end in and of itself, it is a tool among others to achieve appropriate risk reduction...[but] I am proposing for management consideration that as a matter of policy on major chemicals of public interest, if we go into negotiations, results of the negotiations would be subject to public notice and comment and possibly change."[87]

In October 1992, EPA proposed to terminate Amitrole's Special Review after Rhone-Poulenc agreed to take voluntary actions to reduce worker exposure. These measures included the deletion of high exposure application methods such as knapsack sprayers; adoption of a "no-glug" container designed for liquid formulations to reduce splashing while pouring; addition of a protective clothing requirement to labels; and the packaging of a wettable powder formulation in water soluble packets (to prevent the need for the pouring of loose powder into mixing containers). EPA concluded that, in light of these measures, it had completed its risk/benefit analysis of amitrole and had determined that "the benefits of amitrole outweigh the risks."[88]

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[85] *Id.*

[86] *Id.*

[87] *Id.*

C. Reforming Reregistration, Suspension, and Data Management Procedures

The reregistration of existing pesticides is the analytical centerpiece of FIFRA yet it lacks strategic mechanisms for success. Given the inherent indefiniteness of the Agency's underlying risk assessment project, and the incentives for both registrants and regulators to prefer further study to uncertain policy choices, the result is predictable: reregistration becomes an analytical treadmill powered by the rhythms of data call-ins, subsequent requests for data waivers and time extensions, the submission of data that do not always meet EPA's adequacy standards, followed by yet another wave of data call-ins that restart the sequence. The most important procedural reforms are to create countervailing incentives to submit adequate data in a timely manner; to obtain real risk reduction in as efficient a manner as possible; and to provide adequate participatory rights to registrants and the various publics that have a stake in pesticide policy.

1. Create global, reinforcing incentives for the submission of timely, adequate data on EPA's higher-priority pesticides

By providing for the automatic suspension of all "List A" pesticides for which there remain, by a date certain, significant data gaps within the registrants' control, Congress would create a statute of repose that would drive both registrants and regulators to complete rather than perpetuate the data gathering enterprise. The 1988 FIFRA Amendments categorized pesticides into four categories that reflected roughly their potential for human exposure and risk. List A pesticides were those used on food, a group of pesticides to which Congress, ten years earlier in the 1978 FIFRA Amendments, had directed EPA to give regulatory priority.[89] It was for these pesticides that EPA had generally issued registration standards in its pre-1988 reregistration program[90] and it is therefore these pesticides that not only contain the greatest potential for risk but also represent those pesticides that EPA has been evaluating for the longest period of time. Unlike List B, C, or D pesticides, List A pesticides were not subject to the interim statutory deadlines established in the 1988 FIFRA Amendments for Phases 2, 3, and 4. Rather, Congress in 1988 expected these pesticides to move directly to Phase 5, in which EPA determines within one year of the submission of all data whether an active ingredient is eligible for reregistration, with favorable determinations commemorated by EPA's issuance of Reregistration Eligibility Documents ("REDs").[91] EPA issues REDs for pesticide "cases," with cases including either a single pesticide or a group of related pesticides. EPA has grouped the 642 active ingredients in the reregistration program into 407 cases to expedite reregistration.

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[88] Amitrole: Preliminary Determination to Terminate Special Review, 57 Fed. Reg. 46,448 (Oct. 8, 1992).

[89] *See* General Accounting Office, *supra* note 77, at 3-4.

[90] Indeed, List A pesticides under the 1988 Amendments were published on February 22, 1989 and contained 194 active ingredients for which EPA had already issued registration standards. *See* 54 Fed. Reg. 7740.

EPA has made some progress in issuing REDs, but needs a strategic incentive to do much more, especially with REDs for List A cases. Through fiscal year 1992, EPA had issued REDs affecting only 2,200 of the 17,000 products containing List A pesticides, with REDs affecting only another 460 products containing these pesticides viewed as likely candidates for REDs in fiscal year 1993.[92] As of January 1993, EPA had not yet reviewed 3,900 of 10,800 studies (36%) that it had received in response to pre-1988 data requests to List A registrants,[93] nor had it yet reviewed another 800 of 2,000 studies (40%) that it had received from data requests issued between 1990 and 1992.[94] An additional 2,300 more List A studies are expected in response to outstanding data requests. And there are almost certain prospects for further data requests to follow due to relatively high rejection rates of List A studies deemed "unacceptable" (25%) or "upgradable" or "supplementary" (another 25%).[95] For all of these reasons, EPA is behind schedule in its reregistration of List A pesticides. Although EPA estimated in March 1990 that it would issue REDs for 11 List A cases by October 1990, no REDs were issued until January 1991 and by October 1991, only ten REDs for List A pesticides had been issued. In June 1992, EPA found that REDs for 62 List A pesticides had been delayed by an average of 18 months. As of March 1993, most of the REDs for List A pesticides were scheduled to be issued over a four-year period beginning in fiscal year 1994.[96]

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[91] Issuing a RED means that EPA "has evaluated the information submitted on the pesticide and determined that the pesticide poses no unreasonable risk to humans and the environment when used under the terms and conditions EPA has established." U.S. General Accounting Office, *supra* note 14, at 3.

[92] *Id.* at 5. In comparison, EPA had issued REDs affecting 210 products containing List B, C, and D pesticides through 1992, with another 1,113 related products awaiting REDs in fiscal year 1993.

[93] *Id.* at 7.

[94] *Id.*

[95] *Id.* at 12. In fairness to registrants, these high rejection rates may not be attributable even for the most part to the type of structural bias I identified earlier, *supra* notes 69-70. In June 1992, EPA issued the first chapter of a study of these high rejection rates that concluded that part of the problem was misinterpretation and poor guidance from OPP's case review managers to the registrants on what was expected. U.S. General. Accounting Office, *supra* note 14, at 12.

[96] *Id.*

Adding the suspension provision advocated here need not be altogether inflexible, but provisions for flexibility should not detract from the regulatory benefits of imposing real consequences to an unacceptable state of continual delay. It would be possible, for example, to afford automatically suspended registrants a relatively streamlined notice-and-comment procedure in which to make a case for reinstatement—after the fact.[97] But the benefits and fairness of automatic suspension are evident and relate directly to improved processes for reregistration. A meaningful List A deadline will provide a rough risk-based screening device, without elaborate ex ante exercises in prioritizing. Although this Report recommends that the date for automatic suspension be left to Congress, it is worth noting that Congress could choose September 1998—the last date for issuing REDs under the existing statutory timetable—and maintain both fairness and feasibility. Such a date would be fair because it compensates for some of EPA's "learning curve" missteps in implementing FIFRA 1988 in the early years, while still preserving the core integrity of the priorities and deadlines established by two separate Congresses in 1978 and 1988.[98] It is feasible because it comports with EPA's current "educated" estimate that, even after accounting for its own learning-curve mistakes, the issuance of REDs for List A pesticides can be accomplished by 1998.[99] Above all, this fair and feasible device would create a global incentive for registrants to ensure that they understand what EPA expects in data adequacy and to ensure that they do not unduly petition the

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[97] For example, it is plausible that the registrant had submitted all necessary data and was only awaiting at the deadline EPA review and issuance of the RED. To the extent that the registrant had not evidenced in reregistration a pattern of unjustified delay or unjustifiably inadequate submissions, it is conceivable that EPA might articulate in such a case a form of summary reinstatement pending the completion of its data reassessment. But of course the burden would be on the registrant to demonstrate its own lack of accountability for delay (and the time taken for this demonstration, however brief, would also be at the registrant's rather than the public's expense). Although it is also theoretically possible that more extreme cases might arise in which even temporary automatic suspension could arguably disrupt some supplies of food, it is overwhelmingly likely that any such scenarios would have been identified by both registrants, regulators, and affected publics (and presumably also by their representatives in government) as situations where EPA should put its highest regulatory efforts well before the statutory deadline. The incentives, in other words, would work in favor of regulatory prioritizing and against regulatory delay.

[98] Although FIFRA 1988 had evidently desired List A pesticides to be reregistered earlier than the protracted deadlines set for List B, C, and D pesticides, and therefore did not establish a timetable for these pesticides, EPA has interpreted the statute to support its commitment to reassess List A pesticides and reregister products containing them no later than the deadlines imposed for List D, the lowest prioritized pesticides, in September 1998. *See* General Accounting Office, *supra* note 77, at 4. The deadline imposed by automatic suspension relaxes this somewhat by requiring only that REDs be issued by September 1998. FIFRA now envisions roughly a one-year period after the issuance of REDs before EPA can evaluate specific product data and make final reregistration decisions as to particular registrations. *See* Pesticide Regulation Handbook, *supra* note 42, at 139. This one-year grace period roughly corresponds to evidence that EPA had itself delayed quick implementation of FIFRA 1988 by taking longer than expected to identify data gaps, *see* General Accounting Office *supra* note 14, at 13, or by otherwise unclear explanations to some registrants about data requirements, *see* note 95 *supra*.

[99] *See* note 96 *supra*.

Agency for either data waivers or time extensions—in short, to avoid rather than tolerate delay. Registrants (and other affected user groups), moreover, could be expected to pressure the Agency for timely decisions. To the extent the Agency is simply understaffed, the registrants' new stake in regulatory efficiency might lead them to consider political support for additional reregistration fees that would allow OPP to add staff and improve regulatory timeliness.

2. Create additional tactical incentives for adequate and timely data submissions

OPP's experience with chlorothalonil and amitrole indicate that requests for data waivers and time extensions, as well as OMB review of data call-ins, can all contribute to regulatory delay. In May 1991, EPA and OMB reached an agreement that eliminated the need for OMB to preapprove routine data requests under FIFRA.[100] Certainly this agreement should be continued; OMB delay in processing DCIs regarding chlorothalonil set reregistration back as many as eight months.

The problem of requests for data waivers and time extensions is a more difficult issue. In general, and as to the specific cases of chlorothalonil and amitrole, OPP has repeatedly noted how time-consuming these requests can be. This is so despite the fact that OPP has established criteria by which it evaluates requests for time extensions. Both types of requests impose regulatory costs on OPP personnel. The problem is that these requests are not nearly so costly to the requesters. In EPA's experience with chlorothalonil, for example, it granted time extensions to registrants simply to compensate for the time taken in denying the registrants' requests for data waivers.[101] When registrants miss regulatory deadlines for data submission, moreover, FIFRA provides that EPA "may" suspend a registration only after affording tardy registrants thirty days notice, the opportunity to require a limited hearing (which must be held within the next seventy-five days), and the right of having their registrations reinstated immediately upon the tardy submission of the data.[102] The results are predictable. Between August 1991 and February 1992, EPA found it necessary to issue 70 Notices of Intent to Suspend ("NOIS") for nonsubmittal of data.[103] In the majority of these cases (53), the registrant simply submitted data prior to exhausting any of its procedural rights and was no worse off for having missed the deadline.[104] For most registrants, tardiness was costless.

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[100] U.S. General Accounting Office, *supra* note 14, Appendix IV, at 34-35.

[101] *See* text *supra* at 29.

[102] *See* FIFRA Section 3(c)(2)(iv).

[103] *See* EPA, Pesticide Reregistration Progress Report 4-5 (April 1992).

[104] *Id.*

This situation could be improved by providing EPA with two procedural tools. First, EPA should be able to suspend registrants who fail to submit data after providing them simply with a NOIS and a thirty-day comment period (with the opportunity thereafter to seek prompt judicial review of the suspension). FIFRA should be amended to eliminate the registrant's right to an additional hearing. Such a hearing adds little to accurate decisionmaking yet adds to the Agency's administrative burden and can triple the time needed for OPP to impose sanctions for missing data. Second, to prevent the NOIS process from being converted into an automatic time extension within which registrants may freely submit tardy data, submitters of late data should be required to pay a financial penalty.

The problem of inadequate data also compounds regulatory delay: not only does it absorb extra agency processing time, but it can provide the registrant additional time within which to meet its data requirements. To some extent, of course, the added cost of redoing studies provides an incentive to registrants not to submit inadequate data. But the extraordinarily high rates at which EPA has been rejecting data suggest the need to improve incentives for data adequacy. Certainly EPA should provide registrants with competent guidance on the nature and design of studies. But to the extent EPA believes its guidance to have been adequate and the data requirements sufficiently clear, it should be provided authority to impose administrative penalties on those who submit inadequate data that the Agency reasonably determines to be "avoidable."

3. Confirm, regularize, and strengthen EPA's ability to seek interim risk reduction measures through informal negotiations with registrants

As all four of the case histories suggest, EPA has shifted its strategy away from the cumbersome Special Review process and toward informal negotiations with registrants over label requirements and other voluntary risk-reduction measures. Although EPA reserves its options to use the Special Review process to the extent the Agency believes justified, the increasing use of informal negotiations raises two issues. First, the statutory ability to regulate label changes outside of the cancellation process. Second, the openness and effectiveness of label negotiations as a regulatory tool.

(a) FIFRA should not be changed, as some FIFRA reform measures would, to undermine EPA's ability to use the misbranding provisions in FIFRA Section 12 to induce serious negotiations over inadequate labelling

For EPA to be able to achieve relatively quick risk-reduction measures through successful label negotiations with registrants, there must be something for both sides to gain. From the government's perspective, the advantages of negotiation are apparent. Assuming a government that is primarily interested in reducing unreasonable risks from pesticides—label changes can implement risk reduction measures on the basis of existing data, without waiting for the ultimate reassessment of a pesticide's full risks and benefits in reregistration, and can do so much more quickly than existing, time-consuming processes for Special Review and cancellation. From the registrant's perspective, however, the advantages of negotiated label changes are not quite so apparent. Assuming a registrant that is primarily interested in the continued unrestricted sale of its products, forcing the government to postpone restrictions pending the completion of reregistration or a prolonged Special Review/cancellation process has its advantages. A rational registrant will not make prematurely painful concessions during label negotiations unless there is something concrete to gain. The critical leverage to successful label negotiations is FIFRA Section 12 which makes it unlawful now for anyone to sell "misbranded" pesticides,[105] a term defined in FIFRA to include pesticides with labels that do not omit "directions for use which...if complied with...are adequate to protect health and the environment."[106] To the extent registrants fear enforcement of this labeling requirement now, they will rationally believe that there is more to gain from successful label negotiations with EPA.

Whether EPA can in fact bring enforcement actions against inadequately labeled pesticides was presented in *Ciba-Geigy v. EPA*,[107] a decision involving the herbicide Simazine. Registered since 1957, and widely used to control weeds and algae, EPA became concerned during its protracted reregistration of the pesticide with Simazine's potential to contaminate groundwater. Accordingly, in its 1984 registration standard, EPA decided to downgrade Simazine's registration from general use to restricted use, to urge a change in the product's label to indicate the new use restriction, and to include on Simazine's label a warning against use in areas "with specified soil and groundwater conditions."[108] EPA notified Simazine registrants of the Agency's intent to institute cancellation proceedings against any Simazine products not containing the use restrictions and to consider products without new labels in the near future to have become "misbranded" and therefore subject to seizure under FIFRA.[109] In light of EPA's action, most Simazine registrants either complied with the new labeling restrictions or voluntarily cancelled their registrations.[110] Ciba-Geigy, on the other hand, believed that it was entitled to a formal hearing on the new requirements under FIFRA Section 6(b) as a prerequisite to Agency enforcement against it of the new registration standard. Ciba-Geigy sought declaratory and injunctive relief in federal district court (which has jurisdiction over claims that EPA failed to initiate a cancellation hearing).[111] The district court's dismissal for lack of ripeness was reversed and remanded on appeal, and the case settled before the district court could determine on remand the precise statutory question argued by Ciba-Geigy.

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[105] FIFRA Section 12(a)(1)(E).

[106] FIFRA Section 2(q)(1)(F) (definition of misbranded).

[107] 801 F.2d 430 (D.C. Cir. 1986).

[108] *Id.* at 432.

The issues left unresolved are whether EPA can now use, or should be more explicitly authorized by Congress to use, the Agency's authority over misbranded products to enforce changes in labels that current risk assessment data convinces the Agency are necessary to provide adequate protection of public health and the environment. As a matter of interpretation of the existing statutory text, such a result is consistent with the general deference that the agency's reading of the statute deserves under *Chevron v. NRDC*[112] for statutory questions that are not precisely addressed by existing statutory language.[113] And it is also consistent with a trend toward according deference especially to an agency's choice of procedures.[114]

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[109] *Id.* at 432-433.

[110] *Id.* at 433.

[111] 607 F. Supp. 1467 (D.D.C. 1985).

[112] 467 U.S. 837 (1984).

[113] EPA's position in Ciba-Geigy is supported by an analogous decision, arising under the Resource Conservation and Recovery Act ("RCRA"), decided by the D.C. Circuit in Chemical Waste Management v. EPA ("CWM"). At issue in CWM was EPA's issuance of a "corrective action" order to a licensed RCRA facility, which burdened the licensee in the sense that it created specific clean-up obligations. Although RCRA required such "orders" to be made after a "public hearing," the Court of Appeals upheld EPA's interpretation that an informal hearing would be better suited to factual issues that "relate almost entirely to technical (or policy) matters that create little need to establish witness veracity or credibility"...and can be more efficiently evaluated in an informal setting. Finding EPA's interpretation sufficiently reasonable to withstand Chevron Step 2 analysis, the court allowed EPA to use informal proceedings in lieu of formal adjudications.

In the analogous situation under FIFRA, it is equally reasonable to defer to EPA's resolution of the ambiguity between, on the one hand, formal hearings for cancellations and reclassifications and, on the other, enforcement actions against misbranded pesticides. Whichever avenue EPA pursues, the central issues ultimately boil down to whether the risk data supports EPA's view that a pesticide's label must be changed to assure that it adequately protects public health and the environment. This is precisely the same sort of technical or policy matter that the CWM Court concluded to be best resolved outside of formal hearings.

The pending Lehman-Bliley bill, however, may actually reduce both the incentives for registrants to negotiate seriously over label changes and the procedural flexibility that EPA now enjoys. The Lehman bill provides that EPA "may, by use of informal rulemaking under this subsection, prescribe requirements regarding the composition, packaging, and labeling of a pesticide ...."[115] But "informal rulemaking under this subsection" in the Lehman-Bliley bill involves a multi-stage, nine-step process—complete with advanced notices of proposed rulemakings and referrals to the Scientific Advisory Panel—that is far more formal and time-consuming than the informal negotiations EPA now uses. By overproceduralizing EPA's regulation of inadequate labels, the proposed bill reduces the leverage EPA now has to induce registrants into serious label negotiations. As improvidently, the proposed bill would reduce the steadfastness with which EPA could insist on label restrictions. Knowing that the only procedural alternative to negotiation is a cumbersome nine-step rulemaking process, EPA would take what it could get. Knowing this, registrants would not offer much more.

FIFRA should be amended to clarify that EPA may continue to force label changes through an informal process of negotiations with registrants, and may police inadequate labels through enforcement of the Act's misbranding provisions. This comports not only with EPA's practice over the past few years, but is also consistent with proposals by the Clinton Administration to provide for informal "label call-ins" outside of cancellation and suspension procedures.

(b) Make informal label negotiations more open and effective

Creating incentives for registrants to negotiate seriously frames the importance of two additional features of interim risk-reduction procedures—their openness and effectiveness. The importance of publicly open procedures has long been recognized as a concern for EPA's newfound emphasis on label negotiations. As OPP's Acting Deputy Director acknowledged in August 1993, "it is not as open as I'd like to see it."[116] OPP's former Acting Director of the Special Review and Reregistration Division expressed similar concerns when he proposed that "as a matter of policy on major chemicals of public interest, if we go into negotiations, results of the negotiations would be subject to public notice and comment and possibly change."[117]

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[114] *See* generally PBGC v. LTV Corp., 110 S.Ct. 2668 (1990) (formal proceedings, not compelled by statute, are not required simply because the Agency is deciding an issue of large monetary significance to a person); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) (courts cannot compel agencies to use procedures more demanding than those required by statute or the Constitution).

[115] H.R. 1627, *supra* note 190, at Section 6(b)(1).

[116] *See* note 61 *supra*.

The Agency's concern for openness is well-founded. Apart from the benefits to accurate decisionmaking and public acceptability that come with avenues for wider participation, the danger of overreliance on closed-door meetings with registrants should be burned into the Agency's institutional memory. In 1982, then-Representative Albert Gore excoriated the Agency for closed-door meetings with the regulated community under both its FIFRA and Superfund programs, despite Agency protests that its meetings were part of a strategy of voluntary compliance and negotiated settlements.[118] In 1983, the Agency was sued by the Natural Resources Defense Council for making decisions on initiating RPAR reviews in closed-door "decision conferences" with registrants.[119] In 1984, EPA settled the NRDC suit by agreeing to reopen its risk assessment decisions on 13 major pesticides, and by agreeing to promulgate regulations so that "no person or party outside of government will be afforded special or preferential access to agency decisionmakers or to the agency's decisional process."[120] In 1985, EPA promulgated regulations establishing that any private discussions with registrants over Grassley-Allen letters, when the Agency was in its "pre-Special Review" mode, would be summarized and placed in a public docket.[121] The regulations also provided that a decision not to initiate Special Review, along with the Agency's reasons, would also be placed in the public docket and made the subject of a 30-day public comment period, with a final Agency decision on Special Review not reached until after EPA reviewed all public comments.[122]

In evaluating EPA's present practice of private labeling negotiations, it is not enough simply to look at the Agency's pre-Special Review regulations and the regulatory history that spawned them. Technically, there appears to be nothing "illegal" about non-docketed negotiations that take place outside the context of Grassley-Allen letters. But functionally, there has certainly occurred a significant shift in opportunities for public participation. In 1985, Special Review and pre-Special Review were procedural devices at the center of OPP's regulatory program. The purpose of the 1985 regulations was to ensure public access to and participation in these central activities. Currently, EPA has made a conscious policy decision to clear its Special Review docket, either because accelerated reregistration was sapping OPP's resources, because the Agency anticipated the need to "save" Special Review for those pesticides identified as problematic in REDs, or for some other reason.[123] But whatever the reason, OPP's central regulatory device is now label negotiation, and the public has far less access now to OPP's central avenue for regulation than it did in 1985.

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[117] *See* note 87 *supra*.

[118] *See* Panel Calls EPA Enforcement "Disaster," Reprimands EPA Aide for Improper Conduct, 12 Env. Rep. (BNA), No. 50, at 1604 (April 9, 1982).

[119] *See* NRDC v. Ruckelshaus, No. 83-1509 (D.D.C. 1983); Registration, RPAR Decisions Reached in Closed EPA/Industry Sessions, Suit Charges, 7 Chem. Reg. Rep. (BNA), No. 10, at 387 (June 3, 1983).

[120] Closed Door Pesticide Suit Settled; EPA to Reopen 13 Chemical Risk Probes, 8 Chem.Reg. Rep. (BNA), No. 25, at 619 (Sept. 21, 1984).

[121] *See* 50 Fed.Reg. 49016 (Nov. 27, 1985).

[122] *Id.* at 49,017.

This does not mean, however, that private negotiations between EPA and registrants are improper or should be opened to all. To the contrary, it is difficult to imagine how these negotiations might succeed were they to include a potentially unlimited number of participants. More importantly, it is difficult to imagine how publicly conducted negotiations could avoid the often-vast differences of orientation toward the risks and benefits of pesticides that so frequently mark public disputes on the subject. Although "extreme" positions can often turn out in fact to be quite correct, there is unlikely to be a less successful forum for showcasing such positions than negotiations—where the prime commodity is mutual agreement. Especially if one holds modest expectations for risk-reduction measures that might be agreed-upon in private meetings between registrants and the government, the least likely solution would be to open the negotiations at all times to the public—the prospects for polarization, public posturing, and lack of candor seem too strong. On the other hand, this hardly means that there cannot be creative procedural mechanisms that seek the best which both worlds—private negotiation and wide public involvement—can offer.

To seek the best of both worlds, this Report urges that EPA continue to use negotiations to identify real risk-reduction gains that can be achieved quickly through label changes and other measures. This endorsement is with the understanding, of course, that OPP will continue aggressively its obligations under the reregistration and safer pesticides programs to ferret out uses of pesticides that are unreasonable. The interim measures taken in label negotiations should not be allowed to become by default the government's maximum response. Interim label changes outside of OPP's larger programs are better viewed as tentative, even experimental, efforts. They should themselves be subject to change in the face of new data, and under no circumstances should they be viewed as insulating pesticides from the larger scrutiny of OPP's reregistration, Special Review, safer pesticides, and cancellation programs. Moreover, this Report's endorsement of label negotiations is based on the assumptions that registrants will bargain seriously because EPA has an effective alternative in FIFRA's misbranding provisions and, as the Report develops further in Section 4 below, OPP can bargain without fear that its only alternative recourse is an overly cumbersome and resource-intensive cancellation hearing.

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[123] *See* text at notes 57-58 *supra* (EPA has since the late 1980's avoided the Special Review process entirely, having failed to initiate Special Review on any pesticide since 1988).

Even with these caveats, this Report concludes that EPA's private negotiations with registrants needs to take place in a much larger, and more accessible, public context. This could occur, without losing the benefits of negotiations, by adapting for EPA's labeling decisions many of the procedural devices the Agency itself promulgated in 1985 to foster opportunities for public involvement in Special Review and pre-Special-Review decisionmaking. Specifically, EPA should inform interested persons and otherwise notice in the Federal Register that it has begun negotiations with registrants over interim risk-reduction measures. Simultaneously, EPA should open a public "negotiation docket" into which interested persons may submit any information on either the pesticide's risks and benefits or possible risk-reduction measures they believe might be useful.[124] Although EPA is not obligated to place into this public docket contemporaneous information on the status of its negotiations with registrants, Agency personnel must develop their own internal, contemporaneous notes and summaries of all meetings and communications with anyone outside of the Agency about the negotiations.[125] Promptly at the time negotiations are concluded to the extent the Agency wishes to propose label changes, it must place into the public negotiation docket the dates and times of all relevant meetings and communications with non-Agency personnel about label changes and a summary of all non-privileged information that was developed during the negotiations.[126] Before deciding finally whether to approve label changes developed during private negotiations, EPA must publish the proposed changes in the Federal Register and afford interested persons 30 days in which to submit comments.[127]

Striking a better balance between efficient negotiations and broader public participation is only part of the improvement that should be made to EPA's current efforts to negotiate label changes. As importantly, EPA should establish better procedures to ensure that label changes actually correlate with real risk reduction in the field. OPP has perennially had difficulty with follow-up procedures to ensure that the changes it makes on paper have real meaning in practice. In 1986, the General Accounting Office surmised, "[w]hile most registrants may be complying with the labeling requirements, several are not."[128] Generally, compliance with OPP requirements has been mixed. The EPA's fledgling Call-in Action Tracking System in 1986 found that almost half of the requirements imposed by 74 interim registration standards were not being met.[129] Similarly, in 1986, EPA "appear[ed] not to have routinely monitored the conditions imposed [in OPP's conditional registration program] and enforced registrants' compliance with these conditions."[130]

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[124] The negotiation docket is analogous to, although not identical with, the publicly available "docket for Special Review" the Agency established in its regulations in 1985. *See* 50 Fed. Reg. 49016 (Nov. 27, 1985) (promulgating rules governing "docket for Special Review" now codified at 40 CFR §154.15).

[125] As with the case of communications made to the Agency concerning Special Review and pre-Special Review, submitters may have opportunities to assert their claims to confidentiality for certain business information. *See*, e.g., 40 CFR §154.15(c) (assertion of confidential business information claims).

[126] The analogous provision in the 1985 regulations is found at 40 CFR §154.15(b)(7) (EPA to develop memoranda for the public docket "describing each meeting between Agency personnel and any person or party outside of government which concerns a pending pre-Special Review…which shall describe fully and accurately all significant positions taken, arguments made, and facts presented by each participant in the meeting….").

[127] *Cf.* 40 CFR §154.25 ("If the Administrator [after private discussions with a registrant] decides not to initiate a Special Review…he shall issue a proposed decision for publication in the Federal Register…and provide a period generally not less than 30 days for submission of comments").

Especially with label changes, which are utterly ineffective in reducing risk unless they are actually implemented, it is imperative that there be numerous, reinforcing processes for monitoring and enforcement. At a minimum, EPA's newly reorganized Office of Enforcement and Compliance Assurance should recognize how central label compliance is to OPP's program and take steps to supplement the follow-up efforts that can be expected from an already overburdened program staff. But, precisely because most compliance information comes from the field, OPP itself should ensure that the public negotiation docket remains continually open to information from the field on non-compliance with risk reduction measures, and that OPP reopen its negotiations on label changes whenever it appears that earlier negotiations had achieved only paper victories.[131]

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[128] Pesticides: EPA's Formidable Task, *supra* note 6, at 43.

[129] *Id.* at 40.

[130] *Id.* at 96.

[131] Although outside the scope of this Report, it may be that FIFRA's apparent preemption of some common law actions is overbroad and out of sync with the regulatory realities of OPP's labeling decisions. The caselaw on preemption is often predicated on the comprehensiveness of the regulatory scheme and the thoroughness with which EPA approaches pesticide regulation in general and the contents of labels in particular. *See*, e.g., Papas v. Upjohn Co., 985 F.2d 516 (11th. Cir. 1993), cert. denied, No. 92-1938, 1993 WL 205212 (11th Cir. Oct. 12, 1993)(finding common law actions preempted); Arkansas-Platte & Gulf v. Van Waters & Rogers, 981 F.2d 1177, 1179 (10th Cir. 1993), cert. denied, No. 92-1784, 1993 WL 165024 (U.S., Oct. 4, 1993)(same). Although this rationale may well fit label decisions reached at the conclusion of the reregistration process, when EPA has compiled all of the relevant databases and reaches decisions based on a comprehensive assessment, it hardly seems to fit labeling decisions EPA itself characterizes as "interim" in nature and reaches on concededly incomplete databases in an extra-statutory, extra-regulatory practice of private negotiations with registrants. From a policy perspective, it may well be that FIFRA should be redrafted to preempt only those common law actions seeking to go beyond labels comprehensively and openly approved by EPA at the completion of reregistration. Such a policy would reinforce in fact the regulatory comprehensiveness valued so highly in preemption doctrine; indeed, restricted in this way, common law actions would help bring about comprehensive regulatory decisions by creating an incentive (protection from common law actions) for registrants to having the reregistration process completed rather than delayed.

4. Eliminate the ability of registrants to demand formal adjudicatory hearings[132]

The ability of registrants now to demand formal adjudicatory hearings can create procedural nightmares for EPA. FIFRA Section 6(b) now allows registrants to demand formal hearings whenever EPA proposes to cancel a registration, change the regulatory classification of a pesticide from "general use" to "restricted use," or suspend a pesticide because it poses an "imminent hazard" to public health and the environment.[133] In each of these situations, formal adjudicatory hearings add a largely repetitive layer of bureaucratic delay to EPA's central, substantive determination that a pesticide poses unreasonable risk. The prospect of formal hearings also weakens the Agency's substantive bargaining position in the innumerable, but inevitable, interpretive questions that arise—well before the initiation of cancellation proceedings—about the data on a pesticide's risks and benefits.[134] Almost fifteen years ago, Professor Thomas McGarity spoke candidly about his experience in EPA's Office of General Counsel when representing OPP:

> [A]s an attorney for the Office of General Counsel of EPA I often felt significant pressure from my clients in the Office of Pesticide Programs to take a conciliatory posture toward the industry position in order to conserve agency resources. Similarly, my superiors in the Office of General Counsel, operating under severe personnel restraints, constantly stressed accommodation, even if it meant sacrificing broader agency goals to the sad, but unavoidable fact that seven attorneys

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[132] FIFRA Section 3(c)(6) provides that any "applicant for registration or other interested person with the concurrence of the applicant shall have the same remedies as provided for in section 6." Section 6, in turn, provides for formal evidentiary hearings. To the extent applicants for registration or their allies can now demand formal evidentiary hearings when EPA denies applications for registration, the analysis in this Section of the Report should also be read to explain why this formal process should be replaced by a far more streamlined one.

[133] As discussed *supra* at pages 5-6, there are modest provisions for expediting formal hearings regarding the proposed suspension of "imminent hazard" pesticides.

[134] The relationship between formal procedures and the ability of agencies forcefully to implement their substantive missions has been generally recognized. *See* Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 CALIF. L. REV. 1276, 1312 (1972) (burdensome procedures lead to noncontroversial regulations by process of negotiation and compromise); Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 443 (1975) (right to cross-examination complicates and lengthens procedures thereby exerting pressure on agency to take "milder stand"), cited in McGarity, *supra* note 7 at 754 n. 115.

> cannot possibly manage more than two or at most three full-time adjudicatory hearings at a single time.[135]

In my interviews at EPA in 1992, I received similar messages from other staff.

In 1993, there is somewhat surprising evidence that streamlining cancellation proceedings—from formal adjudications to informal rulemakings—is viewed as a relatively noncontroversial idea whose time, politically, has come. The Lehman-Bliley bill pending in the 103rd Congress endorses the shift. Related bills introduced in the 102nd Congress that also urged the shift to informal rulemaking were supported in varying degrees by representatives of the National Agricultural Chemicals Association,[136] the National Agrichemical Retailers Association,[137] the National Food Processors Association,[138] as well as by representatives of the Natural Resources Defense Council[139] and the National Audubon Society.[140] Although there can never be unanimity on such matters,[141] there is remarkable breadth of political support for cancellation by less formal proceedings than FIFRA now allows.

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[135] McGarity, *supra* note 7, at 754 n. 115.

[136] Testimony of Jay Vroom, President, National Agricultural Chemicals Assn, Hearings on the Pesticide Safety Improvement Act of 1991 before the Subcomm. on Dept. Operations, Research, and Foreign Agriculture, House Comm. on Agriculture, 102nd Cong., 2d Sess. 201 (Mar. 18, 1992) ("Our message today…is that cancellation takes too long… . [but] if we must abandon the formal proceedings in current law, the public must retain the right to question participants, on the record, in the [informal] hearings provided in your bill").

[137] Testimony of Dooie Leach, Nat'l Agrichemical Retailers Assn, in Hearings on the Pesticide Safety Improvement Act of 1991, *supra* note 166, at 235 ("Although NARA supports a shortened pesticide cancellation process, we do not support regulatory actions based on unsubstantiated and unscientific speculation").

[138] Statement of Dr. Lester Crawford, Executive Vice President, Scientific Affairs, National Food Processors Assn, in Hearings on the Pesticide Safety Improvement Act of 1991, *supra* note 166, at 259-260 ([providing that consultation requirements are added] "eliminating the current adjudicatory hearing requirement and substituting notice and comment rulemaking…will better enable EPA promptly to cancel pesticides that pose an unreasonable risk and will assist in promoting consumer confidence in the food supply").

[139] Testimony of Erik Olson, Senior Attorney, NRDC, in Hearings on the Pesticide Safety Improvement Act of 1991, *supra* note 166, at 285-286 ([providing that initiation of cancellation proceedings is not delayed and informal processes stay within specified time limits] "the Rose bill would streamline EPA's cancellation and suspension processes, in an effort to reduce the procedural problems identified by Administrator Reilly").

[140] Statement of Maureen Kuwano Hinkle, Director, Agricultural Program, National Audubon Society, in Hearings on the Pesticide Safety Improvement Act of 1991, *supra* note 166, at 422 ([provided that consultation requirements do not delay matters or preclude participation by nonregistrants,] the process is "obviously in need of streamlining").

[141] *See* Statement of William J. Baldwin, American Wood Preservers Institute, in Hearings on the Pesticide Safety Improvement Act of 1991, *supra* note 166, at 575 ("The bill would establish an informal hearing procedure that EPA could conduct at its discretion. This is not an adequate substitute for an adjudicatory hearing at which pesticide registrants have the right to cross-examine Agency scientists and regulators about the adequacy of the basis for their proposal").

The popular groundswell for streamlining the cancellation process, however, cloaks considerable tension between two underlying questions: how formal a procedure is required by the procedural due process clause of the Constitution, and how streamlined a procedure is desirable as a matter of policy. After describing the unnecessarily complex hearing procedures that FIFRA now provides, this Report takes up these two questions in turn.

(a) FIFRA's formal cancellation process is a historical anachronism

President Bush's EPA Administrator did not overstate the case when he observed in 1989, "[t]he current pesticide cancellation process is complicated, duplicative, and inefficient. This country cancels trading in bad stock faster than it gets rid of a bad pesticide."[142] Even though the decision to initiate cancellation proceedings may have been painstakingly reached after years of EPA's Special Review process, and even further years spent evaluating the pesticide for the purposes of developing Registration Standards and/or Reregistration Eligibility Documents, EPA must still further precede initiation of cancellation proceedings by submitting for scientific peer review the scientific studies on which EPA would rely[143] and also for comment a proposed Notice of Intent to Cancel to the U.S. Department of Agriculture ("USDA") and to EPA's Scientific Advisory Panel ("SAP").[144] After affording USDA and SAP 60 days to comment, EPA may at last notify the registrant of the government's intent to cancel. Registrants may then request a formal adjudicatory hearing under FIFRA Section 6. If a hearing is demanded, an administrative law judge ("ALJ") is assigned and the parties enter into prehearing procedures and discovery not unlike the judicial process followed in federal court (complete with opportunities for pre-hearing conferences, in camera inspection of material alleged to be confidential, exchanges of witness lists, summaries of expected testimony, and lists of documents and exhibits).[145] Any party may also request the ALJ to refer "questions of scientific fact" to the National Academy of Sciences for resolution (although referral is discretionary with the ALJ).[146] Thereafter, the actual hearing is held in accordance with the formal procedures established in Sections 556 and 557 of the Federal Administrative Procedure Act. The ALJ must admit "all relevant, competent and material evidence, except evidence that is unduly repetitious."[147] With permission of the ALJ, interlocutory appeals may be filed with the EPA Administrator to resolve "important questions of law or policy about which there is substantial ground for difference of opinion."[148] After testimony is completed, the parties propose orders, findings of fact and conclusions of law to the ALJ, who then prepares an initial decision.[149] Appeals may be made to the Administrator who is required to "consider restricting a pesticide's use or uses as an alternative to cancellation."[150] The Agency's final decision is appealable within 60 days to the courts of appeals which review the decision for "substantial evidence."[151]

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[142] Supra note 11.

[143] *See* FIFRA Section 25(e).

[144] FIFRA Sections 6(b), 25(d).

[145] *See* Pesticide Regulation Handbook, *supra* note 42, at 188.

[146] *See* 40 CFR §164.50(e).

[147] 40 CFR §164.81(a).

Pesticide cancellation hearings have in the past averaged 1,000 days,[152] making them among the most time-consuming adjudicatory proceedings in the federal government.[153] What is rarely appreciated, however, is that this extraordinary commitment of decisional resources does not reflect—and has never reflected—a political consensus that formal procedures are necessary for good decisionmaking. Rather, there is ample evidence to support the thesis that Congress has steadily stitched together an amalgam of procedures designed to serve political rather than analytic goals. The historical argument is complex and, for those interested, is recounted at length in Appendix I to this Report. But for present purposes, suffice it to note that the opportunity for a formal hearing itself was added in the 1964 FIFRA Amendments as a political trade-off for eliminating what was then known as "protest registrations" (the ability of registrants to register their products over the government's objection).[154] The requirement for pre-cancellation notice to USDA was added in the 1975 FIFRA Amendments as political retaliation against EPA's aggressive cancellation hearings in the early 1970's.[155] And referrals to either the National Academy of Sciences or the SAP were added, deleted, and readded to FIFRA in response to congressional approval or disapproval of EPA's aggressiveness in regulating pesticides.[156]

(b) More streamlined procedures can surely pass constitutional muster

Although it has been argued that a cancellation proceeding involves polycentric issues and numerous stakeholders in the decision—and thereby is functionally more like a rulemaking than an adjudication[157]—even proponents of this position concede that "[t]his claim…is not very convincing, and it requires a considerable stretching of the rulemaking-adjudication categories."[158] The more intuitive proposition is that registration under FIFRA creates a statutorily-based property right within the threshold meaning of *Board of Regents v. Roth.*[159] This, of course, is enough at least to trigger constitutional concern over the procedures used by government in terminating the right.

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[148] 40 CFR §164.100.

[149] 40 CFR §164.100.

[150] FIFRA Section 6(b).

[151] FIFRA Section 16(b).

[152] *See* note 7 *supra.*

[153] *Id.*

[154] *See* Hornstein, *supra* note 18, at 427-429; *see also* Appendix I *infra.*

[155] *See* Angus MacIntyre, *supra* note 18, at 219-225; House Comm. on Agriculture, Business Meetings on FIFRA Extension, June-November 1975, 94th Cong., 1st Sess. (1975); Donald Hornstein, *supra* note 18, at 434.

[156] *See*, e.g., Donald Hornstein, *supra* note 18, at 429-434.

The critical question becomes: what process is due? And the touchstone for this question is the Supreme Court's decision in *Mathews v. Eldridge.*[160] There the Court noted that "due process [is] not a technical conception with a fixed content unrelated to time, place and circumstances,"[161] but generally speaking is tailored to the private interest at stake, the government's interest (including the administrative burdens of additional procedure), and the risk of erroneous deprivation under existing procedures and the correlative value of additional procedures.

Although in the case of a pesticide's termination the first two *Mathews* factors cannot be precisely measured with a common denominator, the marginal balance would probably favor the government's interest in informality. The registrant's financial interest in continuing unimpeded all registrations can certainly be high, reflecting investment-backed expectations that have already been made in developing the data necessary for registration and in building a pesticide's clientele and market share. Indeed, investments in a pesticide's registration may have been made in part because cancellation was procedurally difficult.[162] On the other hand, registrants have chosen to make these investments in one of the most dynamic legislative regimes ever enacted (since its modernizing amendments in 1972, FIFRA has been amended in 1975, 1978, 1980, 1988 and 1990) in which the statutory standards and processes have evolved. Balanced against these interests is the government's interest (and perhaps even the industry's interest) in having a process for removing "bad" pesticides expeditiously. Evidence that formal cancellation procedures have undermined OPP's ability to perform its substantive mission cannot be lightly ignored.[163]

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[157] *See* McGarity, *supra* note 7, at 772 (arguing for the adoption of summary judgment practice in cancellation hearings because "a pesticide cancellation proceeding is really polycentric; it is general in form, and its resolution affects many parties in different ways").

[158] *Id.*

[159] 408 U.S. 564 (1972)

[160] 424 U.S. 319 (1976).

[161] *Id.*

[162] *Cf.* Ruckelshaus v. Monsanto, 467 U.S. 986, 1006-1007 (1984) (the lack of reasonable investment-backed expectations in a health, safety and environmental data submitted to support a pesticide registration is influenced by the fact that EPA never promised to keep that data confidential).

The critical constitutional factor, however, will be the risk of erroneous deprivation. For the reasons that follow, this Report concludes that *Mathews'* concern for accuracy supports the constitutionality of a modified form of notice-and-comment rulemaking which allows a limited opportunity for cross-examination as well as several other procedural protections. To begin the analysis, it is useful to recognize several potential sources of error that could attend the use of "bare" notice-and-comment rulemaking to govern pesticide cancellations. First, the registrant would lose the protection of an insulated decisionmaker, at least as to initial decisions. This concern, however, hardly makes an administrative law judge a constitutional necessity. Although it is true that a "rulemaking" official will not be as insulated as would be an ALJ in a formal adjudication, the Supreme Court has held ever since *Withrow v. Larkin*[164] that even the combination of investigative and adjudicative functions in a single administrative decisionmaker "does not, without more, constitute a due process violation."[165] At the most, it would be enough to require the initial decisionmaker not to have been involved in any prosecuting or investigating functions in the cancellation proceeding at hand, and perhaps to provide a "show cause" mechanism by which registrants might offer proof of a real "risk of actual bias or prejudgment."[166]

A second source of error might be the heightened possibility of political or other outside influence—either from the White House, Congress, or other sources of ex parte contacts—that exists in an informal rulemaking as opposed to a formal adjudication.[167] Given the fact that there are some elements of an individualized adjudication inherent in a cancellation proceeding, it is important to recall the D.C. Circuit's decision in *Sangamon Valley Television Corp. v. United States*,[168] that the resolution of "private claims to a valuable privilege [requires in the name of] basic fairness [that] such proceedings be carried on in the open."[169] Here again, however, the concern could be easily addressed by requiring the disclosure of any ex parte contacts. Such a disclosure would operate prophylactically to dissuade at least some outsiders from attempting to interject nonstatutory factors into the Agency's decisionmaking. And, to the extent any ex parte contacts are disclosed in the rulemaking docket, the disclosure itself would alert reviewing courts to assure themselves that the Agency reasonably made its decision according only to legally relevant factors.[170]

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[163] *See*, e.g., notes 7-11, 170 & 171 *supra*.

[164] 421 U.S. 35 (1975).

[165] *Id.* at 58.

[166] CWM, 873 F.2d at 1484 (citing Withrow v. Larkin, 421 U.S. at 47).

[167] *Compare* Professional Air Traffic Controllers Organization ("PATCO") v. FLRA, 685 F.2d 547 (D.C. Cir. 1982) (taking seriously even the possibility of White House pressure on an agency in a formal adjudication) with Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) ("But where agency action involves informal rulemaking of a policymaking sort, the concept of ex parte contacts is of more questionable utility").

[168] 269 F.2d 225 (D.C. Cir. 1959)

[169] *Id.* at 225.

Perhaps the most important procedural guarantee is an adequate opportunity to know the evidence in favor of cancellation and a meaningful opportunity to meet it. Yet this could be accommodated relatively efficiently by very detailed notice of the Agency's reasons for seeking cancellation (including the identification of and access to the data on which the government relies) and, at the outermost, perhaps a limited opportunity to introduce oral testimony and/or pursue cross examination. Generally speaking, orality rights, including the right to cross-examination, are not likely to be fruitful in the factual and trans-scientific disputes likely to predominate in a cancellation proceeding. Although cross-examination might be useful in identifying the costs and benefits of developing additional data,[171] it cannot elucidate the basic policy question of where to draw the balance between risk and benefit in determining unreasonable risk.[172] It is true that cross-examination can be "of great value in probing inferences" that recur in risk analyses,[173] but it "usually reveals only the depth of the disagreement among the experts; it rarely reveals any basis for choosing one expert's interpretation of the data over another's."[174] Given the types of "facts" likely to be at issue in cancellation proceedings, participants should have the burden of showing cause why orality and cross-examination rights would likely improve the accuracy of agency decisionmaking. It is difficult to see why the Constitution would demand more.

(c) Effective regulation requires streamlined procedures

The leading FIFRA reform bill now pending in Congress, the Lehman-Bliley bill (H.R. 1627), nominally calls for a shift from formal adjudication to informal rulemaking—but actually offers hardly any real procedural reform at all. The Lehman-Bliley bill requires nine distinct procedural steps for cancellation, many of them carried over from the overproceduralized statute with which EPA now struggles. Under H.R. 1627, for example, EPA may not initiate an "informal cancellation rulemaking" unless it first receives comments from a "scientific peer review committee" (consisting of expert EPA employees or consultants) on a "validated test" or "other significant evidence" on which EPA wishes to base its rulemaking.[175] There are no time constraints within which the peer review committee must submit its comments to EPA. Second, EPA must then provide affected registrants "prenotice" of the evidence on which it proposes to base its rulemaking and allow them 30 days to "respond." Third, EPA must provide similar "prenotice" to USDA and the Department of Health and Human Services. USDA is required to provide a benefits analysis of the pesticide to EPA, and EPA cannot proceed until it obtains comments from USDA, but no time limitation is imposed on USDA's analysis.[176] Fourth, EPA must issue an Advanced Notice of Proposed Rulemaking ("ANPR") in the Federal Register in which it summarizes the factual data on which the notice is based, the major scientific assumptions involved, the "prenotice" given the registrant, and any significant comments received, and provides for a 60-day comment period.[177] Fifth, 60 days after the ANPR, EPA may issue a notice of proposed rulemaking in which it discloses factual data, major "scientific assumptions, legal interpretations, and policy considerations," a summary of available risk-benefit information, and EPA's tentative conclusions regarding the balancing of risks and benefits.[178] EPA must provide a 90-day comment period. Sixth, simultaneously with its general notice of proposed rulemaking, EPA must provide USDA and HHS with a copy of the proposed rule and allow them 90 days to comment.[179] Seventh, any person who comments may, within 15 days after the close of the comment period, demand an "informal hearing," not to exceed 20 days duration, to begin within 60 days of the close of the comment period; the informal hearing is to be conducted by a presiding officer "in a manner that encourages discussion and debate on questions of fact."[180] Eighth, simultaneously with its notice of proposed rulemaking, EPA shall provide the SAP with notice of the proposed rule and allow SAP to file a report no later than 30 days after the close of the comment period, unless the SAP chooses to hold a "public hearing to discuss the proposed rule," in which case the

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[170] The extent to which standards for cancellation are well specified and relatively transparent to registrants can also enhance the procedural legitimacy of informal cancellation proceedings. Although it cannot be said that only a fully specified congressional standard for determining what constitutes "unreasonable" risk is constitutionally required, the more that EPA develops internal guidance documents and regulations on unreasonable risk, the more clearly adequate are fairly basic notice-and-comment cancellation proceedings. *See, e.g.*, Chemical Waste Management v. EPA, 873 F.2d at 1484 (upholding EPA's informal corrective action rulemakings despite lack of fully developed administrative standards for corrective action in light of other sources of agency guidance—for both EPA and affected permittees—on what constitutes corrective action.).

[171] *See* McGarity, *supra* note 7, at 777.

[172] *Id.*

[173] *Id.*

[174] *Id. See* McGarity, *supra* note 7, at n. 242 (problems encountered in FDA hearings partly due to wide-ranging and unproductive cross-examination of expert witnesses).

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[175] H.R. 1627, Section 6(b)(2).

[176] *Id.*, Section 6(b)(3)(B), (4)(A).

[177] *Id.*, Section 6(b)(4).

[178] *Id.*, Section 6(b)(6).

[179] *Id.*, Section 6(b)(6)(B).

[180] *Id.*, Section 6(b)(7).

SAP must report within 30 days after the close of its hearing.[181] Ninth, EPA may issue its final rule (but "may not prohibit the use of a pesticide if alternative requirements will assure that the pesticide…will not generally cause unreasonable adverse effects") that "shall" be accompanied by a statement explaining the Agency's reasons; responding to any comments made by USDA, HHS and SAP; and responding to "each significant comment" in the general rulemaking docket.[182]

In contrast to Lehman-Bliley, all that is constitutionally required and all that is needed for a full, fair, and efficient ventilation of the issues would be (1) detailed notice of the Agency's reasons for seeking cancellation, including the identification of and access to all data on which the Agency depends, (2) the disclosure of any discussions between agency personnel and all persons outside of the Agency regarding the proposed cancellation, (3) an opportunity to argue actual bias by the Agency's rulemaking officer, (4) a reasonable period of time in which to file written comments and submit data, and (5) an opportunity to show cause why further process is reasonably likely to improve the accuracy of agency decisionmaking.

IV. The Regulation of Safer Pesticides

The regulation of new pesticides is integrally related to EPA's success in regulating older pesticides. To the extent that newer, safer pesticides are available, EPA will be more aggressive in policing and evaluating the data for existing products, and more willing to find risks to be unreasonable, because the aggressive regulation of risk will not necessarily lead to lost benefits. In short, a successful safer pesticides program can catch the Agency up to the scientific warnings being sounded repeatedly about pesticide exposure. Rather than viewing a safer pesticides initiative as simply another burden to an already overburdened program, safer pesticides should be viewed as a key both to EPA's success in reregistration and to its ability to transform FIFRA into a prototype of progressive environmental legislation that combines incentive-based regulation, comparative risk analysis, and pollution prevention.

Without taking a position on the substance of the Agency's first steps toward a safer policy initiative taken in July 1992 when EPA first solicited public comments on possible ways in which the Agency might encourage safer pesticides[183] or further steps taken in January 1993 when EPA announced that the

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[181] *Id.*, Section 6(b)(8).

[182] *Id.*, Section 9.

[183] *See* Incentives for Development and Registration of Reduced Risk Pesticides, 57 Fed. Reg. 32140 (July 20, 1992) (request for comments).

Agency was still struggling with but excited by the idea of encouraging a safer pest management regime,[184] this Report urges that Congress consider an expressly procedural option with which EPA can implement whatever substantive decisions it reaches on safer pesticides.

EPA should seek from Congress informal rulemaking authority to "phase-down" the use of existing pesticides whenever the combination of risk data on existing products and the availability of safer pest management products or practices leads EPA to believe that current risk levels may be unreasonable. Such a mechanism, rather than being merely another "tool" for an overworked agency to contemplate, can offer widespread and reinforcing incentives for effective regulation throughout EPA's pesticide programs.

First, phase-down rulemaking would provide an expeditious vehicle for moving beyond interim label changes when the data suggest continued concern about an existing pesticide but are just inconclusive enough to dissuade the Agency from full cancellation.

Second, phase-down rulemaking would provide a vehicle for EPA to offer concrete market entry to entrepreneurs willing to invest their resources in products that will advance the risk-benefit frontier closer toward a truly sustainable agriculture in which effective pest management and environmental protection can better coexist. It is hardly incongruous for EPA to offer such market advantages; its current program under FIFRA provides market protection to existing pesticides by preventing the entry of competing products.

Third, phase-down rulemaking provides for an incremental style of decisionmaking in which EPA's reasoned judgments about comparative risk can be tested and reevaluated without making irreversible decisions about existing pesticides (where the data are incomplete) and safer pesticides (where the data are incomplete)—it provides a built-in method for making progress while at the same time hedging one's bets.

Fourth, phase-down rulemaking provides a flexible form of rulemaking that can be used to reinforce other programs EPA administers. For example, to the extent EPA's water office identified pesticide run-off as a significant problem for Chesapeake Bay, EPA could choose to phase-down in that one region alone the pesticides of concern and phase-in a more promising alternative.

Fifth and perhaps best, phase-down rulemaking provides a way to implement efficient markets for safer pest management practices. Because growers face innumerable local differences that affect their pest problems, it is impossible for any centralized command-and-control system to know where farmers can efficiently use safer pest management practices and where they cannot. By restricting a pesticide's use, however, phase-down rulemaking will cause the price of the pesticide to rise. This creates an efficient market for pest control alternatives. Those farmers for whom the safer products work will switch to the extent the price is cost-effective (producers of safer products will price accordingly). Those farmers for whom the safer products may not work will still be able to purchase pest protection at a higher but still cost-effective price (existing producers will also price accordingly). If data indicate that the pesticide that at first appeared safer actually is ineffective, regulators can always reopen the rulemaking and phase-up the older products. If data indicate that the safer pesticide is even better than expected, regulators can decide whether this makes the older products' risks unreasonable.[185]

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[184] *See* Incentives for Development and Registration of Reduced-Risk Pesticides Program, 58 Fed. Reg. 5854 (Jan. 22, 1993).

V. Conclusions and Proposed Recommendations

Pesticide regulation should be reformed to create incentives for reduced risk, regulatory compliance, program flexibility, and wider public participation. To these ends, the following recommendations are made to Congress and the Environmental Protection Agency.

1. Because good data are central to the integrity of EPA's substantive decisions, and because the submission of such data is critical to the timeliness of agency action, EPA should promulgate, whenever possible, clear, written standards on the adequacy of data and communicate those standards to registrants.

2. Congress should provide EPA with the authority to impose administrative civil money penalties on registrants for the submittal of data after any applicable deadline, or for the submittal of data (even if timely) the inadequacy of which can be demonstrated by reference to clear data standards adopted by EPA.[186]

3. Congress should consider changing the incentives of registrants for reasonably expeditious reregistration by imposing an essentially automatic suspension of List A pesticides for which there still remain, by a date certain,

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[185] It is not a forgone conclusion that regulators will always, or even ever, move quickly to cancel an existing pesticide entirely simply because there is a safer alternative. There will always be pest resistance possibilities to contemplate that may make it reasonable to maintain at least some uses of pesticides that are more risky in only some respects.

[186] *See* Administrative Conference Recommendation 93-1 "Use of APA Formal Procedures in Civil Money Penalty Proceedings," 1 CFR §305.93-1.

outstanding significant data gaps within the registrant's control. Once suspended, pesticides could subsequently be reinstated through a petition process.

4. Congress should eliminate the provisions in FIFRA allowing for formal adjudicatory hearings and provide instead an informal procedure that affords registrants notice of the grounds on which EPA bases its proposed suspension or cancellation actions and reasonable opportunities to file written comments. Only upon cause being shown, would the agency grant the registrant the right to introduce oral testimony or to subpoena and cross-examine witnesses in individual cases.

5. EPA should regularize and open for broader public participation its informal procedures for achieving interim risk reduction through pesticide label changes. EPA should inform the public, through a Federal Register notice, when it commences private label negotiations with registrants. EPA should simultaneously open a public "negotiation docket" into which interested persons may submit comments they believe might be relevant, for consideration by EPA and the registrants during their negotiations. If, after negotiations with registrants, EPA proposes a label change, it should publish a notice of the proposed change in the Federal Register and provide the public an opportunity to file written comments. The notice should include a concise, general statement of the proposed label's basis and purpose, including a summary of the material aspects of the agency's negotiations with registrants.

6. EPA should ensure compliance with label changes. After a label change, the agency should establish and publicize the availability of a "compliance docket," for any input about the effectiveness or ineffectiveness of interim risk-reduction measures. In addition, EPA's Office of Pesticide Programs (OPP) should communicate to EPA's Office of Enforcement and Compliance Assurance the adoption by OPP of label changes and any material information received by OPP in its compliance docket.

7. Congress should consider providing EPA the authority to order a phase down in the use of any registered pesticide through an informal rulemaking procedure in which EPA considers such factors as the relative risks and benefits of the pesticide at issue when compared with alternative pest management products and practices.

APPENDIX

FIFRA And the Politics of Proceduralism

Perhaps the most revealing aspect of pesticide regulation under FIFRA and FFDCA is that its critics seem to see in it two entirely different things. One broad criticism is that the scheme allows for public hysteria over pesticides to displace a more scientific approach. Arguments urging the need for more scientific decisionmaking were launched against EPA for its suspension in 1979 of the herbicide 2,4,5-T;[1] for its regulatory actions in 1984 against the nematicide ethylene dibromide (EDB);[2] and for its cancellation in 1989 of the growth regulator daminozide (Alar).[3] Currently, the argument is reflected in criticism of the Ninth Circuit's literal interpretation of the Delaney Clause in *Les v. Reilly*[4] where critics argue the scientific "irrationality" of a zero-risk interpretation of FFDCA Section 409 because it would preclude the registration of new pesticides posing less risks of cancer than currently registered "older" pesticides.[5]

On the other hand, there is an equally long tradition of criticizing pesticide regulation under FIFRA and FFDCA for being overly cautious and methodical. EPA was criticized for dragging its feet on both EDB[6] and Alar,[7] as well as for its more general failure to consider a broader range of risks posed by pesticides such as risks to farmworkers,[8] particular risks to children,[9] the risks of inert ingredients,[10] ecological risks,[11] and the risks of groundwater contamination.[12] In recent congressional hearings on FIFRA reform, the statute was characterized as having "simply…failed to assure that there will be timely and appropriate action taken to protect human health and the environment from pesticides."[13] The National Research Council's June 1993 report on pesticide residues in the diets of infants and children has provoked renewed concern that EPA's risk assessments are inadequately framed to reflect real risks.[14]

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[1] *See* R. Jeffrey Smith, "*EPA Halts Most Uses of Herbicide 2,4,5-T,*" 203 SCIENCE 1090-1091 (1979)("an example of government at its worst—basing a hasty product suspension on data which have not been subjected to scientific review") (quoting Ethyl Blair, spokesperson for 2,4,5-T's producer, Dow Chemical Company); *see also* Sheila Jasanoff, *The Fifth Branch* 24-26 (1990).

[2] *See* William B. Havender, *EDB and the Marigold Option*, January/February 1984 REGULATION 13, ("extremists controlled the momentum of these events"); Jasanoff, *supra* note 1, at 130-133.

[3] *See* advertisement, *New York Times*, April 5, 1989, at A11 (full page advertisement signed by sixty-five scientists decrying EPA's "unfounded attacks on the safety of our food supply"); Jasanoff, *supra* note 1, at 141-151.

[4] No. 91-70324.

[5] *Id.*

[6] *See* Jasanoff, *supra* note 1, at 135 (criticizing EPA for having authority to investigate substitutes to EDB for six years before acting).

[7] *See* Linda M. Correia, *"A" is for Alar: EPA's Persistent Failure to Promptly Remove Hazardous Pesticides from the Food Supply*, 16 Chem. Reg. Rep. (BNA), No. 20, 868, 878 (Aug. 14, 1992) ("The Alar case illustrates EPA's timid approach to the enforcement of the pesticide laws").

[8] *See, e.g.*, 15 Env. Rep. (BNA), No. 47, at 1689 (Feb. 28, 1992) (General Accounting Office critique of EPA's "cursory protection" of farmworkers from pesticide dangers); 14 Env. Rep. (BNA), No. 7, at 251 (May 18, 1990) (critique by Office of Technology Assessment that EPA's focus on carcinogenicity has downplayed neurotoxic effects that may pose an even greater threat to human health, especially among farmworkers); 13 Env. Rep. (BNA), No. 23, at 725 (Sept. 8, 1989) (no excuse for ignoring 313,000 cases of pesticide-related illness among farmworkers).

[9] *See, e.g.*, 15 Chem. Reg. Rep (BNA), No. 49, at 1784 (Mar. 13, 1992) (EPA failed to protect children from dangers associated with aldicarb application to citrus crops); 15 Chem. Reg. Rep. (BNA),

One of the major conclusions reached in this Report is that these twin criticisms, rather than reflecting only administrative missteps by EPA, reveal statutory tensions that have been designed by Congress, in some cases advertently and in other cases inadvertently, into FIFRA itself. Although FIFRA has been reported as having freed pesticide regulation from the provincialism of agricultural interests in both Congress and USDA, procedurally FIFRA was set free only to wander in a complex labyrinth of risk-based decisionmaking in which slow-going was often a statutory requirement.

A. The Early History of Pesticide Regulation

In its earliest years, pesticide regulation was desultory at best under both the 1906 Federal Food and Drug Act,[15] which delegated to USDA's Bureau of Chemistry the duty to protect consumers from impure food, and the 1910 Insecticide Act,[16] which delegated to USDA the authority to protect farmers from false advertising and nonefficacious pesticides. After lax regulation by the Bureau of Chemistry caused USDA in 1925 to dissolve the Bureau and transfer

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No. 15, at 461 (July 12, 1991) (residue limits do not always reflect safe levels for everyone, especially children, because of the composition of their diet and their low body weight relative to exposure).

[10] *See, e.g.*, 14 Chem. Reg. Rep. (BNA), No. 20, at 789 (Aug. 17, 1990) (some inert ingredients are known to be more toxic than the active ingredients, and the public, because EPA has not required labeling of inerts, has no way of taking adequate precautions); 13 Chem. Reg. Rep. (BNA), No. 45, at 1436 (Feb. 16, 1990) (EPA faulted for not considering potential health effects of inert ingredients).

[11] *See, e.g.*, 21 Env. Rep. (BNA), No. 4, at 266 (May 25, 1990) (SAB Report criticized EPA for placing too much emphasis on human health issues and ignoring broader ecological issues); 13 Chem. Reg. Rep. (BNA), No. 18, at 632 (Aug. 4, 1989) (bird mortality from pesticides indicates that there is broader ecological damage occurring).

[12] *See, e.g.*, 18 Env. Rep. (BNA), No. 4, at 438 (May 22, 1987) (EPA's piecemeal approach to groundwater protection from various sources including pesticides needs to be integrated); 17 Env. Rep. (BNA), No. 40, at 1672 (Jan. 30, 1987) (calling for end of "regulatory patchwork" governing protection of ground water from pesticidal and other forms of contamination).

[13] *See* Subcommittee on Department Operations, Research and Foreign Agriculture, House Committee on Agriculture, *Hearings on Pesticide Safety Improvement Act of 1991*, 102d Cong., 2d Sess. 176 (1992) (statement of Erik Olson, Senior Attorney, Natural Resources Defense Council).

[14] *See* National Research Council, *Pesticides in the Diets of Infants and Children* 8-10 (Nat'l Academy Press 1993).

[15] Federal Food and Drug Act of 1906, 34 Stat. 768 (repealed 1938).

[16] Pub. L. No. 61-152, 36 Stat. 331 (1910).

its functions to USDA's newly created Food Drug and Insecticide Administration (later renamed the Food and Drug Administration)("FDA"),[17] there began an effort by FDA scientists in the 1930's to use animal experiments and extrapolate from them the possible long-term effects of pesticides on humans.[18] These incipient efforts were stymied in 1937 by Representative Clarence Cannon, chair of the House Subcommittee on Agricultural Appropriations and a former apple grower (who once proclaimed, "lead arsenate on apples never harmed a man, woman, or child"),[19] in a USDA appropriations bill that prohibited the FDA from using funds "for laboratory investigations to determine the possibly harmful effects on human beings of spray residues on fruit and vegetables."[20] In one of the first political efforts to shape science in support of pre-conceived social conclusions about pesticides, Cannon assigned research jurisdiction over the health effects of pesticides to the Public Health Service ("PHS") which used the far less discriminating analytical approach of merely questioning farmers and field hands about their health.[21] Although, in 1938, the Food, Drug and Cosmetic Act[22] gave FDA the authority to set legal "tolerances" for pesticide residues, the tolerances still had to be based on PHS methodology and the new statute gave judicial appeal rights to any parties who might be "grievously affected" by even the inadequate tolerances that FDA could establish.[23] FDA was moved out of USDA and into the new Federal Security Agency in an executive reorganization in 1940, but its pesticide-related work remained firmly within the jurisdiction and watchfulness of congressional appropriations committees that were dominated by senior farm bloc legislators.[24]

The development of inexpensive, synthetic chemical pesticides between 1940 and 1945 led to enactment in 1947 of the original Federal Insecticide, Fungicide, and Rodenticide Act[25] as a mechanism for regularizing the market for these new chemicals.[26] The original FIFRA required USDA to "register" pesticides whenever their "labels" contained sufficient "directions for use which …if complied with [were] adequate for the protection of the public."[27] Pesticides without such labels were considered "misbranded"[28] and, although producers could insist that USDA register a product "under protest" (even when USDA had rejected a registration application or had proposed to cancel an existing registration),[29] an action could be brought by the appropriate United States Attorney alleging that these "under protest" pesticides inadequately protected the public.[30] In such a case, the government shouldered the burden of proving its allegations.[31] None of this was controversial. FIFRA came into the world by voice vote without "significant comment or debate,"[32] reflecting the widely shared political perception that pesticide policy was mostly a matter of accommodating the interests of growers and the emerging chemical industry.[33]

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[17] *See* Christopher J. Bosso, *Pesticides and Politics* 50 (1987).

[18] *Id.* at 50.

[19] See Thomas R. Dunlop, DDT: Scientists, Citizens and Public Policy 50 (1981).

[20] *See* Bosso, *supra* note 17, at 50.

[21] *Id.* at 50.

[22] Food, Drug & Cosmetic Act of 1938, Pub. L. No. 717, ch. 675, 52 Stat. 1046.

[23] *See* Bosso, *supra* note 17, at 51-52.

[24] *Id.*

[25] Pub. L. No. 80-104, 61 Stat. 163 (1947).

[26] *See* Bosso, *supra* note 17, at 55-56 (industry sought a labeling statute to prohibit "fly-by-night" producers of imitations of the new synthetic chemicals).

[27] *Id.* 2(u)(2)(c).

[28] *Id.*

During the 1950's, public positions on pesticides did take shape with most, but not all, policies decidedly supportive of pesticide use. The only skeptical policies stemmed from congressional investigations chaired by New York Representative James Delaney into the growing use of synthetic chemicals in agriculture and the pharmaceutical industry,[34] and resulted in the addition of Sections 408 and 409 to the FDCA in 1954 and 1958, respectively.[35] Apparently mindful of the way scientific methodology might be manipulated to shade the effects of pesticides, Representative Delaney explained that the prohibition in Section 409 of any pesticide residues found to induce cancer in humans or animals (the so-called "Delaney Clause") had "slammed shut and locked" the door to allowing even small amounts of carcinogens in food.[36] Yet, despite such bold rhetoric, the Delaney Clause in fact became one of the least-used provisions of the FDCA[37] and the enactment of Sections 408 and 409 attracted little popular attention from a public who viewed the congressional debate as "esoteric and technical."[38]

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[29] *Id.* Section 4(c).

[30] *Id.* at Section 6(c).

[31] *See* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 593 & note 34 (D.C. Cir. 1971) (the effect of the "under protest" provision in the original FIFRA made it incumbent upon the government to prove the pesticide unsafe before the product could be removed from the market).

[32] *See* Bosso, *supra* note 17, at 58 (noting that passage of the Act was mentioned only in passing in the *New York Times* Food Section).

[33] *Id.* at 59.

[34] *See* Hearings Before the House Select Comm. to Investigate the Use of Chemicals in Foods and Cosmetics, 81st Cong. 2d Sess. and 82nd Cong., 1st & 2d Sess. (1950-1952).

[35] *See* Richard A. Merrill, *Regulating Carcinogens in Food: A Legislator's Guide to the Food Safety Provisions of the Federal Food, Drug, and Cosmetic Act*, 77 MICH. L. REV. 171, 179-180 (1978).

[36] Food Additives: Hearings on Bills to Amend the Federal Food, Drug, and Cosmetic Act with Respect to Chemical Additives in Food Before a Subcommittee of the House Interstate and Foreign Commerce Committee, 85th Cong., 2d Sess. 498 (1958). Delaney was speaking specifically about a 1955 FDA decision that had approved a one part-per-million tolerance for residues of the pesticide Aramite after concluding that such a residue level "would offer no hazard to the public." Tolerances and Exemptions from Tolerances for Pesticide Chemicals in or on Raw Agricultural Commodities, 20 Fed. Reg. 7301 (1955). *See* Food Additive Hearings, *supra*, at 498. As Professor Richard Merrill has further chronicled, Delaney later supplemented his view of Section 409 by mentioning the Aramite decision by name: "Mr. Speaker, the significance of FDA's former ruling on Aramite was that for the first time a precedent was set that might give legal sanction to the introduction of so-called 'safe' quantities of cancer-inciting additives into food.... [It is the] firm purpose [of the Delaney Clause] to slam shut and lock [the door that the ruling had opened]." 104 Cong. Rec. 7783 (1958), *cited in* Richard A. Merrill, *FDA's Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific*

In contrast, there were far more visible public policies that openly supported pesticide use with almost unrestrained enthusiasm. In addition to subsidizing pesticide development in the country's land-grant colleges,[39] USDA organized several highly publicized "eradication" campaigns against the gypsy moth in the Northeast and the fire ant in the South. So supportive of these efforts was Representative Jamie Whitten, then Chair of the House Subcommittee on Agricultural Appropriations (and known for two decades in Washington as the "permanent Secretary of Agriculture"),[40] that Whitten insisted on providing USDA with more funds for the campaigns than it had requested.[41] When mounting evidence of fish and wildlife losses from these campaigns began to dissuade state officials from further cooperating, USDA offered literally to give away the fire ant insecticide heptachlor to any private property owner willing to use it.[42] Despite a growing scientific consensus that the fire ant's dangers had been overblown,[43] USDA redoubled a "barrage of government press releases, motion pictures, and government inspired stories portraying the fire ant as a despoiler of southern agriculture and a killer of birds, livestock, and man."[44]

Ironically, it was USDA's intransigent support for the increasingly unpopular eradication campaigns in the 1950's that created the receptive public that Rachel Carson addressed in 1962 and that ultimately prompted amendments to FIFRA in 1964 and 1972. Before focusing on those amendments, however, it is important to highlight one last aspect of what is often viewed as the political "republican moment" that transformed pesticide regulation in the 1960's and early 1970's.[45] Among other things, Carson questioned the government's

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Progress?, 5 YALE J. ON REG. 1, 55 n.288 (1988) (noting, however, other evidence indicating the language may in fact be ambiguous).

[37] *See* Merrill, *supra* note 35, at 178.

[38] *See* Bosso, *supra* note 17, at 80.

[39] *See* Board on Agriculture, National Research Council, *Alternative Agriculture* 77 (1989)(most federal research funds to land grant colleges for pest control supported work on chemical technologies aimed at boosting yields).

[40] *See* Bosso, *supra* note 17, at 67.

[41] *Id.* at 82.

[42] *Id.* at 102.

[43] *Id.* at 20 (National Research Council found that the ant's sting was no worse than a bee's); *id.* at 86 (many USDA entomologists worried little about the agricultural impact of the fire ant).

[44] *Id.* at 88.

[45] According to the concept of "republican moments," environmental statutes are enacted not during the "normal" political periods that are typically responsive to conventional interest group pressures, but rather during "extraordinary moments" when broad segments of the population become intensely interested in environmental issues, often due to well-publicized environmental "crises" or other attention-getting

manipulation of science to support the toxicological safety of pesticides by attacking the government's reliance on a National Academy of Sciences-National Research Council ("NAS-NRC") pesticide panel that, in Carson's view, was dominated by industry-sponsored experts.[46] When *Silent Spring* itself ignited a public controversy, President Kennedy bypassed NAS-NRC and sought policy advice from the President's Science Advisory Committee ("PSAC"), which issued a report in 1963 that largely supported Carson.[47] There followed counter-studies from NAS-NRC attacking the PSAC,[48] counter-counter-attacks on the NAS-NRC for itself being "unscientific,"[49] and a further "proliferation of 'expert' studies, each claiming to be the definitive analysis on pesticides and debunking claims propagated by rival studies."[50] It was against the backdrop of this quite politicized science that over a dozen separate committees or subcommittees of the 88th Congress held pesticide-related hearings in 1963 and 1964 on six different FIFRA reform bills that had been introduced into the House and three that had been introduced into the Senate.

B. The 1964 FIFRA Amendments: The Beginnings of Proceduralism

The 1964 FIFRA Amendments are most widely noted for eliminating the ability of producers to compel USDA "under protest" to register a pesticide or to continue a pesticide's registration.[51] Although it was generally acknowledged that few producers had used this provision,[52] its elimination was interpreted as signaling an important shift in the burden of proof needed by the government to

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"symbolic" events. *See generally* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J. L. ECON. & ORGAN. 59, 59-66 (1992), referring to James Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 291-93 (1990) ("And if history is any indicator, the legal system's response to these "republican moments" may be far more important than its attitude toward interest group politics").

[46] *See* Rachel Carson, *Silent Spring* (1962).

[47] *See* President's Science Advisory Council, *Use of Pesticides* (Washington, D.C. May 15, 1963); *see* Bosso, *supra* note 16, at 121-122 ("The PSAC panel acknowledged the benefits to society from chemical use, but overall concluded that 'the decisions on safety [were] not as well-based as those on efficacy,' and that 'until publication of *Silent Spring* by Rachel Carson, people generally were unaware of the toxicity of pesticides'").

[48] *See* National Academy of Sciences-National Research Council Report 920A, B, & C, *Pest Control and Wildlife Relationships* (1962-1963).

[49] *See* Bosso, *supra* note 17, at 124 (citing Audubon Society policy analyst Frank Graham).

[50] *Id.* at 121.

[51] *See, e.g.*, John D. Conner, Jr., et al, *Pesticide Regulation Handbook* 2-3 (3d ed. 1991).

[52] *See* U.S. Senate, Committee on Government Operations, Subcommittee on Reorganization and International Organizations, *Hearings on Interagency Environmental Hazards Coordination* 15, 88th Cong., 1st Sess. (1963) (Only 23 of some 50,000 products were registered "under protest" between 1947 and 1963); *see also* Bosso, *supra* note 181, at 126.

keep pesticides off the market.[53] Whereas the "under protest" provision of the original FIFRA effectively required the government to prove the dangerousness of a pesticide in a judicial "misbranding" action,[54] the 1964 Amendments gave USDA final authority to refuse registration or to cancel existing registrations without going to court,[55] with judicial review of the agency's factual determinations limited to the familiar "substantial evidence" test.[56] In addition, USDA was given the authority to "suspend" a pesticide's registration immediately "to prevent an imminent hazard to the public."[57] The 1964 Amendments have been interpreted as sending a warning shot over the bow of the "pesticide subgovernment," the entrenched pro-pesticide interests on the congressional agriculture committees and at USDA, that policymaking must become more responsive to the public concerns that had been articulated by Rachel Carson.[58] This is the "republican moment" explanation for the 1964 FIFRA Amendments.

There is another perspective, however, with which to view the 1964 FIFRA Amendments. Political economists Matthew McCubbins, Roger Noll, and Barry Weingast (known collectively as "McNollGast") have argued that Congress, when it enacts statutes that delegate policymaking tasks to agencies, will rationally design administrative structures and processes that lead to the types of substantive policy outcomes that are desired.[59] The underlying dynamic that forces Congress to think so strategically about administrative form, McNollGast argue, is that agencies can to some extent ignore *with impunity* the substantive policy preferences implied in legislation; agencies can play a "game" within a reasonably broad "policy space" in which policy moves away from that envisioned in the enabling legislation but toward a new point that so benefits either the

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[53] *See* 110 Cong. Rec. 2948-2949 (1964) (remarks of Congresswoman Sullivan) ("I am strongly in favor of the legislation now before you to require industry, rather than the Federal Government, to shoulder the burden of proof in connection with the marketing of pesticides which may be unsafe for use as intended"); *see also* H. Rep. No. 1125, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 USSCAN 2166, 2167 ("[A]t present, the Secretary can be required to register a product even though he is convinced that it is ineffective and dangerous to human health. He can proceed against it...only after it has moved in interstate commerce, and he then has the burden of proving that it violates the law").

[54] *See* text accompanying notes 30-32, *supra*.

[55] *See* 78 Stat. 190(3).

[56] *See* 78 Stat. 190(4)(d).

[57] *Id.* at Section 3.

[58] *See* Bosso, *supra* note 17, at 125 ("The transformation in the pesticides debate was so swift that those promoting the use of pesticides were unprepared to deal with new sets of policy claimants. The twin blows delivered by *Silent Spring* and the PSAC report made it obvious to all save the most recalcitrant defenders of the status quo that *some* change would emerge as the debate moved from the front pages to the committee rooms and the federal office buildings").

[59] *See* Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

House, Senate or President that one or more of these players will rationally choose not to support (or will choose to veto) any corrective legislation.[60] From the point of view of the enabling legislative coalition—the President (assuming he supports the bill) and the winning majorities in the House and Senate—the prospect of such "policy drift" is especially unnerving. Because neither the President nor the winning coalition in the House or Senate knows *ex ante* at whose expense (policy-wise) the agency's game will be played, each of them faces the dreary post-enactment prospect of "getting" to the agency before the others do.[61] Yet this defeats the purpose of banding together into a legislative coalition in the first place. So, McNollGast predict, rational players will find it in their best interest to design into the enabling legislation *ex ante* administrative structures that protect against agency noncompliance.[62]

For the purposes of analyzing FIFRA, the significant aspect of the "McNollGast Hypothesis" is its tenet that administrative structures and processes can play distinctly political roles. First, Congress can design administrative structures and processes in such a way as to create informational requirements that affect the difficulty (or ease) of agency policymaking and that can give significant advantages to a favored constituency by increasing "the dependence of the agency on information the constituency supplies."[63] Second, Congress can require agencies to act only after observing certain procedural complexities in part to create "fire alarms" that signal Congress sufficiently early of agency action to allow for congressional intercession before the agency can put together an uncorrectable "fait accompli."[64]

The 1964 FIFRA Amendments offer both some support and some difficulties for the McNollGast model. On the one hand, it is plain that Congress gave careful attention to the administrative structure and processes that USDA was to follow; indeed, these processes seemed to have been crafted by Congress to *undermine* the ostensible relaxation in the burden of proof for which the amendments are most widely known. This was accomplished in two ways. First, although USDA could now refuse to register or cancel a registration without worrying about protest registrations, it could do so only after a formal "public hearing" if requested by the disappointed party.[65] Formal cancellation proceedings soon became the most time-consuming adjudicatory proceedings in the federal government.[66] Second, even before demanding a public hearing, disappointed parties were given the right to have USDA's proposed decision "referred to an advisory committee" composed of experts "*selected by the National Academy of Sciences*"—which at the time was the single most visible scientific body associated with public criticism of Rachel Carson and public support for the safety of pesticides.[67] Although the advisory committee's reports were not binding on USDA, the 1964 Amendments seemed to specify with unusual clarity that courts were to affirm USDA's decisions "if supported by substantial evidence when considered on the record as a whole, *including any report or recommendation of an advisory committee*."[68]

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[60] *Id.* at 435-439.

[61] *Id.* at 439 (although "each of the three wants to minimize the chance that one of the other two will influence the agency against its interests...all have an ex post incentive to spend resources persuading the agency to sway policy their way. This is a negative sum game....").

[62] McNollGast explain:

> First, if political actors are risk averse, all three will prefer greater certainty in policy implementation as compared to random noncompliance (that is, noncompliance that may drift away from the preferred outcome of each of the three. Second, each of the three wants to minimize the chance that one of the other two will influence the agency against its interests... . Third, none of the parties wants to let the agency choose which political actor to favor.

Id. at 439.

[63] *Id.* at 440.

[64] *Id.* at 441.

On the other hand, for all the evidence of Congress's understanding that process can affect substance (one of McNollGast's central premises), McNollGast predicted that the winning coalition would use process to safeguard—not undermine—the substantive gains made in the statute. This suggests either that process "losses" are traded off against substance "gains," a bargaining strategy that has been suggested by others[69] but is not consistent with the McNollGast model, or that, contrary to the "republican moments" explanation for the 1964 Amendments, it actually is not particularly clear whether the pro-pesticide or anti-pesticide side really won.[70]

C. The 1972 Amendments: Attempts to Shift the Burden of Proof

Events between 1964 and 1972, surprisingly, provide support for both the McNollGast Hypothesis *and* a republican moments theory of legislation. The defining event during this period was a "jolt" to business-as-usual politics caused by rising public concern about the pesticide DDT and by the emergence of environmentalism as a national political force. In a series of lawsuits in state courts between 1966 and 1969, the newly formed Environmental Defense Fund effectively put DDT "on trial" before a national audience.[71] As evidence of DDT's risks mounted, there arose numerous state and local prohibitions on DDT use[72] and, in 1969, a federal task force's recommendation for a phased elimination of all but essential uses of DDT over two years.[73] Given the predictable ineffectiveness of FIFRA, and the USDA's pro-pesticide mindset, it is not surprising that FIFRA played almost no role in these events; indeed in early 1969 the General Accounting Office issued a report severely criticizing the lethargic track record USDA had developed under FIFRA.[74] Following that most quintessential of republican moments, Earth Day 1970, President Nixon sought to capitalize on rising voter support for environmental issues by creating EPA and transferring to it all responsibility for administering FIFRA, for pesticide tolerance-setting under FDCA, and for several other pesticide-related research functions that had been scattered across the federal government.[75] In 1971, the D.C. Circuit interpreted FIFRA's cancellation provision to require the initiation of cancellation proceedings against a pesticide when the Agency had expressed "substantial questions concerning [its] safety."[76] The combined effect of all this activity was plainly a shift in pesticide policymaking toward more regulation. And, as the McNollGast model predicts, because the shift worked to the advantage of some of the political principals (for example, President Nixon), it was impossible for others to budge the new equilibrium point through corrective legislation.

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[65] *See* 78 Stat. 190(3).

[66] *See* Thomas O. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L. J. 729, 730 n.11 (1979).

[67] *See* Bosso, *supra* note 17.

[68] 78 Stat. 190(4)(d).

[69] *See* Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, J. L. ECON. & ORGAN. 213, 230 (1990) ("public agencies will tend to be structured in part by their enemies—who want them to fail").

[70] *See* Bosso, *supra* note 17, at 125-132 (noting the competing "successes" of pro-pesticide and anti-pesticide forces in the 1964 Amendments).

But, although the status quo ante could not be completely regained (that is, FIFRA could not be immediately returned to USDA), the 1972 FIFRA Amendments demonstrate a major conceptual limitation of the McNollGast Hypothesis. The limitation stems from the fact that legislators and agencies rarely view statutes as *all* good or *all* bad; some provisions are preferred over others. And, when policy "drifts" during implementation, it usually occurs one provision at a time (typically through a rulemaking). Accordingly, if the agency plays McNollGast's implementation game, it has no guarantees that the disaffected principals will not be able to form retaliatory coalitions to change other provisions which the agency would prefer to leave alone or to withhold from the agency something that it doesn't have but wants. Knowing this, one wonders why the agency will attempt to get away with what it can on any *one* policy; to paraphrase McNollGast, if an agency is risk averse it will prefer certainty in its delegated authority to random retaliation by its principals.[77]

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[71] *See* Bosso, *supra* note 17, at 135-137 (describing litigation and the role it played in forming the Environmental Defense Fund as well as environmentalism generally).

[72] *Id.* at 138 (collecting state and local statutes).

[73] U.S. Dept. of Health, Education & Welfare, Report of the Secretary's Commission on Pesticides and Their Relationships to Environmental Health (the "Mrak" Commission) 5 (1969).

[74] *See* U.S. General Accounting Office, Need to Improve Regulatory Enforcement Procedures Involving Pesticides (Sept. 10, 1968).

[75] *Id.*

[76] *See* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 595 (D.C. Cir. 1971); *see also* Angus MacIntyre, *A Court Quietly Rewrote the Federal Pesticide Statute: How Prevalent is Judicial Statutory Revision?*, 7 LAW & POL'Y 249 (1985).

Just such retaliation happened in the politics of FIFRA in the 1972 Amendments. In 1972, environmentalists pressed the political advantages given them by the public's heightened anti-pesticide sentiment by insisting on rescission of the registrant's "right" to refer agency decisions to the NAS advisory committee; after 1972, such referrals became discretionary with the EPA hearing examiner.[78] Next, environmentalists also gained a much-desired "classification" system for registering pesticides either as "general use" or "restricted" pesticides, with restricted-use chemicals allowed to be used only under the supervision of "certified applicators."[79] Finally, the standard for registration became no "unreasonable adverse effects on the environment" rather than a more demanding "substantial environmental effects" test that had been proposed in a competing bill,[80] and, moreover, EPA could now require registrants to support their registrations with specified types of data.[81] All of these provisions can be viewed as collectively relaxing EPA's burden of proof for regulating pesticides and, to give McNollGast credit, they can also be viewed as examples of legislative victors "hardwiring" administrative structures and processes into legislation to ensure that the "right" substantive policy choices will subsequently be made.

The problem, however, is that other provisions in the 1972 Amendments plainly made it *more* difficult for EPA to regulate pesticides. Most significantly, an indemnification provision was added which required EPA to indemnify "any person" who suffers financial losses "by reason of a pesticide's suspension or cancellation"[82]—a provision which hung around the Agency's neck until 1988, forcing it to contemplate depletion of its operating budget any time it began efforts to protect public health. In addition, a new Section 3(c) provided that a pesticide's "lack of essentiality" could not be used as a criterion for denying registration[83]—despite strenuous arguments from EPA that essentiality should be a primary criterion to reduce what was then viewed as a "glut of available products."[84]

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[77] *See* McNollGast, *supra* note 59, at 439.

[78] *See* Pub. L. No. 92-516, Section 6(d), 86 Stat. 973.

[79] *Id.* Section 3(d).

[80] *See* Bosso, *supra* note 17, at 160 (Table 7)(describing competing legislative proposals).

[81] *See* Pub. L. No. 92-516, Section 3(c)(1), 86 Stat. 973.

[82] Pub. L. 92-516, 86 Stat. 973, Section 15(a).

[83] *See* Pub. L. No. 92-516, Section 3(c)(5).

[84] *See* Bosso, *supra* note 17, at 163.

D. EPA Implementation: 1972-1976

Almost immediately after the 1972 Amendments were in place, EPA's Office of General Counsel ("OGC") intensified its efforts to cancel the registrations of several organochlorines including DDT, Aldrin/Dieldrin, Heptachlor/Chlordane, and Mirex.[85] OGC attorneys, however, soon learned how demanding the "unreasonable risk" standard could be; the bellwether proceeding against DDT became mired in the endless evidentiary possibilities for asserting, and challenging, the extent of all the various risks (to wildlife, to farmworkers, to consumers) posed by DDT.[86] To streamline the cancellation proceedings, OGC attorneys streamlined the analysis. Rather than an open-ended inquiry into the universe of risks and benefits, the Agency began to focus its case on animal data showing a pesticide's carcinogenicity, on evidence of widespread human exposure to the pesticide, and on evidence of increasing pest resistance from which the Agency could downplay the pesticide's benefits.[87] Using this formula, EPA prevailed in each of its cancellation proceedings, although even under the streamlined inquiry the adjudicatory proceedings each took over two years to complete.[88]

As EPA successfully began to ban pesticides, however, it only highlighted the immensity of the Agency's regulatory task: the enormous effort required by the handful of cancellation proceedings hardly made a dent in the Agency's statutory duty to reregister the entire inventory of 50,000 existing products, containing hundreds of active ingredients.[89] The 1972 Amendments had required EPA to promulgate implementing regulations within two years and to complete reregistration of all existing pesticides within four years.[90] Although this task belonged to the Agency's scientists in OPP rather than to the OGC attorneys, OPP staff borrowed the streamlined analytical approach pioneered by OGC in the cancellation proceedings and crafted an innovative regulatory device, the "rebuttable presumption against registration" ("RPAR") for use in the Agency's registration and reregistration programs.[91] If a pesticide ingredient was found to be oncogenic in test animals, it automatically triggered a RPAR process under which the burden of proof formally shifted to manufacturers to submit data rebutting the presumption to avoid Agency issuance of notices of intent to cancel.[92] If further data were not required, products were eligible for full reregistration.[93] The RPAR was viewed as a promising regulatory initiative that "proffered a substantial reduction of [the reregistration] caseload by providing a screening device that would rapidly isolate, and focus available evaluation capacity on, the worst chemicals while the safer ones underwent pro forma reregistration."[94]

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[85] *See* Angus MacIntyre, Administrative Initiative and Theories of Implementation: Federal Pesticide Policy, 1970-1976, 1985 PUBLIC POL'Y AND THE NATURAL ENVT. 205, 215 (1985).

[86] *See id.* at 215 ("in many respects the first hearing, against DDT, was a disaster for EPA...the proceeding was unfocused and the adversaries could adopt a strategy of evidentiary all-inclusiveness which obscured the central questions").

[87] *See id.* at 216.

[88] *Id.*

[89] *See* Staff Report to the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, The Environmental Protection Agency and the Regulation of Pesticides, 94th Cong., 2d Sess. 11 (1976) (hereafter the "Kennedy Report") (35,000 products had been registered under prior federal laws and 15,000 under various state laws).

[90] Pub. L. No. 92-516, Sec. 4, 86 Stat. 998-99 (1972).

[91] *See* MacIntyre, *supra* note 85, at 217.

E. The 1975 FIFRA Amendments: Proceduralism and the Burden of Proof

These EPA initiatives, however, provoked a political backlash that demonstrates both the strengths and fragility of the McNollGast Hypothesis in constructing a positive political theory of environmental legislation. To begin, the 1972 Amendments contained a sunset clause which required reauthorization of FIFRA before October 1975.[95] Concerned that EPA's initiatives reflected too risk averse an attitude toward pesticides, the agrichemical industry complained to Congress that EPA's pesticide programs had been wrenched away from scientists by agency lawyers.[96] FIFRA approached expiration several times, to be extended only for pointedly short periods of time while the House Agriculture Committee held hearings excoriating EPA Administrator Russell Train for acting "unscientifically" and extracting a pledge from Train to "demote" OGC attorneys and elevate OPP scientists as the "primary" office at EPA in charge of pesticide policy.[97] Not content with this concession, Congress amended FIFRA in 1975 to establish a Scientific Advisory Panel ("SAP") which EPA was required to "consult" prior to making cancellation decisions or promulgating regulations affecting registration.[98] In addition, the 1975 Amendments required EPA to notify USDA of proposed cancellations, changes in classification, or proposed regulations (an amendment that would have granted USDA "veto" power over all

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[92] *See* 40 CFR §162.43(f)(1)(i)(A)(3) (1976).

[93] *Id.* 162.43(f)(1)(i)(A)(1).

[94] *See* MacIntyre, *supra* note 85, at 215-216.

[95] *See* Pub. L. No. 92-516, 86 Stat. 973. Although a sunset clause might be rationalized by McNollGast as a warning device designed to prevent policy drift at EPA, its existence is otherwise difficult to square with McNollGast's prediction that legislators try to "hardwire" administrative procedures into statutes so as to make it unnecessary for Congress to rely on its oversight capabilities.

[96] *See* MacIntyre, *supra* note 85, at 219-220.

[97] *Id.* *See also* House Comm. on Agriculture, Business Meetings on FIFRA Extension, June-November 1975, 94th Cong., 1st Sess. (1975).

[98] *See* Pub. L. No. 94-140, 89 Stat. 751 (1975).

EPA pesticide decisions came within eight votes of passing the House),[99] and required EPA to "take into account the impact of major regulatory action on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy."[100]

Although these changes are described in the legislative history merely as securing good science[101] and balanced consideration of risks and benefits,[102] one observer of FIFRA has concluded that the 1975 Amendments "gave back to the agriculture lobby a little of the ground it lost when pesticide regulation was removed from the U.S. Department of Agriculture and placed within the newly established EPA."[103] Another commenter has stated, "[t]he 1975 amendments...were the result of agribusiness dissatisfaction with EPA's attempts to take effective, forceful action to protect public health and the environment."[104]

The 1975 Amendments demonstrate both the limits and usefulness of the McNollGast Hypothesis. Although, as McNollGast predict, the new legislative coalition tried to "hardwire" into legislation administrative structures and processes (SAP and USDA consultation) that reflected the coalition's substantive preferences (which had now plainly shifted to the agriculture side of pesticide policy), Congress in 1975 retaliated against EPA by "unwiring" the administrative features of the 1972 Amendments that had made aggressive regulation of pesticides possible in the first place. At least as to pesticide regulation, McNollGast overemphasize the singular importance of administrative structure as a political device and underestimate the more traditional policing function of legislative oversight and correction. On the other hand, consistent with the McNollGast Hypothesis, the 1972 and 1975 amendments together indicate the usefulness of administrative procedures in telegraphing to Congress significant agency action that Congress might choose to police. What seems clear in any case is that, by 1975, the republican-moment aspect of pesticide regulation could not alone provide a political theory of FIFRA. As political scientist Angus MacIntyre concludes, "[a]t the very least, 'the environment' lost its aura of sacrosanct national priority...[as] industries [began] challenging the environmental carte blanche in a manner that was infeasible before the 1972 presidential elections."[105]

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[99] *See* Pub. L. No. 94-140, 89 Stat. 751 (1975) (consultation requirements); 121 Cong. Rec. 9190-91 (daily ed. Sept. 16, 1975) (remarks of Representatives Young and Latta) (USDA "veto power" amendment).

[100] *See* Act of November 28, 1975, Pub. L. No. 94-140, Sec. 1(2), 89 Stat. 751, *amending* 7 USC §136(d) (1988).

[101] *See* FIFRA Extension Hearings, *supra* note 97, at 125, 138, 146.

[102] *Id.* at 125.

[103] See Sheila Jasanoff, The Fifth Branch: Science Advisors as Policymakers 124 (1990).

[104] William E. Reukauf, *Regulation of Agricultural Pesticides*, 62 IOWA L. REV. 909, 918 (1977).

[105] MacIntyre, *supra* note 85, at 218.

Report for Statement 16

Organization of Adjudicative Offices in Executive Departments and Agencies

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

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Introduction

Federal administrative agencies today have more opportunities than ever to help enforce the criminal law. Congress has attached criminal sanctions to an increasingly wide range of regulatory violations that have not until now carried the moral stigma of more conventional crimes.[1] Criminal sanctions have increased to the point that they are at least as attractive in many settings as civil sanctions. Moreover, public sentiment lately seems to favor aggressive pursuit of white collar crime. These and other factors have involved an increasing number of federal regulatory agencies more routinely in investigations leading to criminal convictions.

The gathering of information is always a vital part of these agency efforts to enforce the law, whether criminal or civil. In areas where agencies collect information that may ultimately lead to criminal charges, they confront a tension between two investigative models. One model is the wide-open investigative process of the regulatory agency, which routinely collects huge amounts of information from the subjects of regulation, often with the cooperation of those subjects. The other potential model for agency investigations is the somewhat more bridled process imposed on more traditional criminal investigators, such as the police and the grand jury. These two models are alike in significant ways. Where they differ, however, the agency and the subject of regulation operate amid unsettled expectations.

This report assesses one aspect of the investigative process for federal administrative agencies: the role of legal counsel. It surveys the limitations federal agencies place on the presence and participation of legal counsel when the agencies conduct investigations. Special attention is devoted to those investigations where an agency has not ruled out the possibility of criminal penalties. The agency investigations canvassed include both investigations of regulated parties and investigations of agency contractors and employees.

Part I of the report describes the ways that an agency venturing into criminal law enforcement can encounter unsettled expectations regarding access to attorneys. It also introduces a general strategy for dealing with such uncertainties regarding the right to counsel during investigations. Part II reviews specific limitations now applicable to the role of counsel in investigations of those subject to regulation. Part III covers investigations of agency contractors, with more limited access to legal counsel. Throughout, the report compares agency practices to similar investigative practices of government bodies, such as police departments or grand juries, charged exclusively with enforcing the criminal laws. Part IV contains a summary of the changes in agency practice discussed and recommended earlier in the report.

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[1] *See* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can be Done About It*, 101 YALE L.J. 1875, 1878-82 (1992); Lawrence G. Baxter, *Judicial Responses to the Recent Enforcement Activities of the Federal Banking Regulators*, 59 FORDHAM L. REV. S193 (1991).

I. General Approaches to Defining the Availability of Legal Counsel

Where the FBI, the federal grand jury, or the Department of Justice investigate a crime, traditional doctrines of criminal procedure answer many questions about the role of legal counsel for the target. But at other times a criminal prosecution is based on evidence collected by a federal administrative agency not typically associated with criminal law enforcement. The Environmental Protection Agency may gather evidence of an environmental crime, or the Nuclear Regulatory Commission may uncover evidence of a criminal violation by a utility company or its employees. Statutes, rather than constitutional doctrine, answer many of the questions about legal counsel in the context of an administrative agency's investigation.

This Part contains some general observations about the proper method for fleshing out ambiguities in those statutes. Should the statutes in the administrative setting be interpreted to mirror the right to counsel in the criminal context as much as possible, or are there special considerations calling for adjustment of the right to counsel in the administrative setting?

A. The Limits of Constitutional Guidance

Lawyers can expect the guarantees of the Fifth and Sixth Amendments to shape some of the opportunities for legal counsel to interact with the government as it gathers information to enforce the criminal law. The Fifth Amendment's privilege against self-incrimination voices an expectation that government will obtain information without forcing parties to testify against themselves. In some settings, the government will provide suspects with warnings about potential self-incrimination and about access to legal counsel. The Sixth Amendment's right to counsel emphasizes more directly the importance to parties of having access to informed legal representatives when interacting with the government.

The provisions of the Sixth Amendment, however, do not apply with full force to the early stages of criminal investigations. The Supreme Court has held that the constitutional right to counsel does not apply to investigatory stages of the criminal process. Instead, it attaches only after formal criminal proceedings, signaled by an information or indictment, have begun against the defendant.[2] A grand jury witness has no constitutional right to the presence of counsel in the grand jury room when the witness is called to testify.[3]

Similarly, the warnings sometimes required of the government under the Fifth Amendment do not apply to every criminal investigation. The self-incrimination clause does not require government warnings if the government does not take "custody" of the person. The Supreme Court has decided that grand jury witnesses are not in "custody" for these purposes.[4]

Despite these limitations, constitutional provisions still provide reasonably good access to counsel during the phases of traditional criminal investigations where counsel is most important. Involvement with the criminal justice system is an extraordinary event for most; the government does not begin to gather evidence against most suspects long before an arrest or indictment occurs. Thus, ongoing contact with counsel is not critical for many until the time that the process has formally begun. Pivotal investigative events such as eyewitness identifications and custodial interviews are most often conducted after the suspect has access to counsel.

On the other hand, the constitutional right to counsel does not cover the most important aspects of an administrative investigation: the early and ongoing efforts of government to collect information. Instead, the Administrative Procedure Act, along with many enabling statutes and agency rules of procedure, extend the right to counsel into these earlier stages of the investigation. Section 555(b) of the APA provides that a person compelled to appear before an agency may be "accompanied, represented, and advised by counsel."

The brief reference to counsel in the APA leaves a number of questions open. The text does not specify the types of actions attorneys may take in representing their clients during agency investigative proceedings. Nor does it indicate precisely which persons coming in contact with an agency may invoke the right to counsel.

The legislative history of Section 555(b) is equally unilluminating. The 1941 Attorney General's Report on Administrative Procedure in Government Agencies is strangely taciturn on the subject of legal representation.[5] Statements in both House and Senate committee reports regarding this provision of the APA state simply that it is "designed to confirm and make effective" the "statutory and mandatory right" of interested persons to appear personally or with counsel before the agency.[6] The 1947 *Attorney General's Manual on the Administrative Procedure Act*, an influential contemporary interpretation of the APA, says only that the statute "restates existing law and practice that persons compelled to appear in person before an agency or its representative must be accorded the right to be accompanied by counsel and to consult with or be advised by such counsel."[7] Thus, the text and legislative history of the APA provision on counsel do not explain its relationship with the constitutional right to counsel.

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[2] Kirby v. Illinois, 406 U.S. 682 (1972).

[3] *See* Fed. R. Crim. Proc. 6(e).

[4] United States v. Mandujano, 425 U.S. 564 (1976).

[5] Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941). The report throughout refers to the presentations and contentions of "parties," without any indication whether parties would or would not have the benefit of legal counsel.

The different needs of investigative targets in the purely criminal and the administrative settings may suggest why the APA provides for counsel earlier than the constitutional protections. Administrative agencies and criminal law enforcement operate on fundamentally different assumptions about the appropriate relationship of the government and its citizens. Criminal enforcement begins with the presumption that government involvement in the affairs of the citizen is exceptional. The law treats compliance as an ordinary state, and enforcement efforts aim to preserve an already existing peace. By contrast, agency investigations treat government involvement in the affairs of citizens as both ordinary and necessary. Where an agency creates and administers a regulatory regime, it has a mandate to change customary practices. The ongoing interaction between government regulators and the regulated target, in which routine collection of information could later form the basis for a criminal prosecution, make the presence of counsel more important earlier in the investigation of an administrative crime.

B. Context for Determining the Scope of the Statutory Right to Counsel

Inevitably, there will from time to time be some doubt about whether the government may properly limit the participation of counsel during an investigation. When that occurs in cases arguably covered by the APA, the first recourse should be to the text of the statute. As we have seen, however, that text will not answer many questions about the precise scope of the right to counsel because the statute declares its protections in general terms. The legislative history, as noted above, provides scant guidance. At this point, where should an interpreter turn?

1. Reasons for Limited Access to Counsel

It seems clear for several reasons that the subject of a routine administrative investigation cannot insist on the same access to counsel as a criminal suspect in the custody of the government. First, government agencies often must investigate the activities of its employees or contractors in an effort to monitor and improve its own performance. Where the government gathers and uses information in its role as employer or supervisor of a contractor, the investigative methods open to the agency should be broader than those available to criminal investigators.

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[6] Sen. Doc. No. 248, 79th Cong. 2d Sess. 205, 231, 263 (1946).

[7] Attorney General's Manual on the Administrative Procedure Act 61 (1947).

Second, many agency investigations lead either to civil sanctions or to no sanctions at all. Quite often, the investigators do not know in the early stages of investigation what sort of enforcement measure will be most appropriate and effective. The decision remains open until much of the evidence has been collected. So long as agencies remain uncertain about the type of sanctions they will seek, it seems acceptable for their investigations to take a path different from the one prescribed for criminal investigations.

There are several other less convincing reasons often used to argue for limited access to counsel during administrative investigations. For instance, it might be thought that certain agency investigations could be subject to less rigorous legal constraints because of the importance of a particular agency's job. One investigation of a violation of environmental regulations could affect the health and safety of large numbers of people, certainly more so than the typical criminal misdemeanor or felony. The serious consequences of many violations of health and safety regulations could conceivably lead towards allowing those agencies even greater latitude in their investigations than might be allowed in a criminal investigation.

However, the enacted law and judicial decisions do not appear to adopt this approach. The Administrative Procedure Act applies uniformly to federal agencies, with no effort to distinguish between the more and less important regulatory areas.[8] Similarly, courts evaluating different agency regulatory techniques have stated that they are not influenced by the relative importance of the work of the agency involved. When faced with issues of statutory construction, the courts emphasize the uniform treatment of agencies under the APA,[9] and hesitate to interpret an agency's enabling statute in a way that overrides the APA. Even when interpreting constitutional provisions such as the search and seizure clause of the Fourth Amendment, courts have tended to announce requirements that apply uniformly to all agencies.[10]

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[8] 5 USC §551(1) (1988) ("agency" defined without regard to subject matter, except for military authorities).

[9] SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976).

[10] United States v. Powell, 379 U.S. 48 (1964) (setting out requirements for constitutional validity of administrative document subpoena); Dole v. Trinity Industries, Inc., 904 F.2d 867 (3rd Cir. 1990) (Secretary of Labor sought enforcement of subpoena duces tecum for required health and safety records; court determined the phrase "reasonably relevant" applied to any inquiry the Secretary might make, and there was no necessity that the information had to be relevant to one particular case); United States v.

It may seem remarkable that the importance of the regulatory interest has played so little role in judicial decisions, particularly in the constitutional issues raised by agency investigations. For some time now, courts have enthusiastically used "balancing" methodologies, which attempt to consider a wide range of relevant facts,[11] and the effect of regulation on health and safety would certainly seem to be a relevant fact here.

Nevertheless, if courts or lawmakers were to vary the controls on agency investigations based on the perceived importance of the agency's mission, it might lead to hopeless complexity. It could prove extremely difficult to identify the type and amount of "impact" a regulatory agency must have on the public in order to qualify for preferential investigation rules. One might classify all of the work of one agency for preferred treatment, or one might focus on some part of the agency's work that is most important. One would also have to decide on the relative importance of threats to health, versus threats to aesthetic values, and so on. It is little wonder that the courts have not generally tried to distinguish important criminal investigations from lesser ones, or to use this factor to identify agency proceedings where access to counsel should be enforced most stringently.

2. Contexts Calling for Broader Access to Legal Counsel During Agency Investigations

Although there will surely be times when the right to counsel during an agency investigation must remain limited, many subjects believe that the right to counsel should reach its apex when an agency enforces the criminal law. When agency investigations start to resemble traditional criminal investigations, there are several reasons why access to counsel becomes more important. First, an agency's criminal enforcement often leads to a different type of penalty for the target of the investigation than does civil enforcement. An individual target of an investigation would likely prefer to face a prosecution for civil violations than a criminal prosecution, since in the latter case he or she could be punished with a prison term rather than a fine. Regardless of the size of the fine involved, most assume that a deprivation of personal liberty is a more serious penalty than a fine.[12]

Admittedly, the type of penalty at stake has not been and should not be the sole determinant of the proper scope for the right to counsel. To begin with, the

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Comley, 890 F.2d 539 (1st Cir. 1989) (NRC attempted to enforce a subpoena for tape recorded telephone conversations between target and director of special interest group).

[11] T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943 (1987).

[12] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. OF POLITICAL ECONOMY 169 (1968). On the continuum of restrictions on liberty available through various criminal sanctions, *see* NORVAL MORRIS AND MICHAEL TONRY, BETWEEN PRISON AND PROBATION (1991).

type of penalty involved matters little to organizational targets, and agency investigations are frequently aimed at organizations rather than individuals. Organizations cannot be imprisoned, and the penalties they face in criminal and civil proceedings are not dramatically different. Moreover, many individuals committing "regulatory crimes" do not face a realistic prospect of imprisonment under the federal sentencing guidelines. Nevertheless, restrictions on liberty are possible criminal penalties for some administrative crimes. To the extent they are available against an individual target, they do stand apart as a significantly different type of outcome and may justify the best available access to counsel.

A second factor also makes it appropriate to employ an expansive right to counsel where the agency takes on criminal enforcement functions. When the government proceeds with criminal charges, the target encounters more serious moral stigma and negative publicity than when the government chooses civil enforcement. This distinction may be the most reliable and traditional method of distinguishing civil from criminal enforcement. However, with the proliferation of criminal statutes based on relatively technical violations of complex regulatory regimes, and based on lessened mens rea requirements, the moral stigma attached to criminal violations may not be quite as distinctive as it once was.[13]

3. Proposal for a System Centered on the Government's Intended Use of Information

The characteristics of administrative investigations set forth so far seem to spell trouble for any uniform treatment of right to counsel issues. Since it is rare for an agency to know early in its investigation how it intends to use some information, it does not seem appropriate to insist on the fullest possible participation of counsel in every aspect of an agency's investigation. Yet there are cases, those ending in the uniquely intrusive and stigmatizing sanctions of the criminal law, where it does seem more important to involve counsel more completely from the start. The trouble, of course, is in identifying those cases early enough in the process.

The difficulty in identifying the government's future uses of information can be a real concern for regulated parties. Their expectations are shaped in a regulatory context where cooperation with regulators is often their best strategy. When criminal charges appear at the end of a lengthy and sometimes informal process of collecting information, the target may have a feeling of being duped. If the regulator had declared her intention to obtain criminal charges wherever possible, the target might have consulted more carefully and consistently with an attorney, and the attorney would likely have taken a more adversarial stance.

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[13] *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal?": Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193 (1991); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1.

The agency's choice of its enforcement objective could be pivotal in determining the proper scope to give the right to counsel. Where the agency has decided to pursue regulatory or non-criminal remedies alone, a lower set of expectations about investigative techniques would be palatable to regulated parties. If the agency can declare prior to an investigative effort that it will only use the information obtained in a civil or regulatory enforcement action, or in the general policymaking functions of the agency, then a lenient set of expectations would provoke little or no controversy.

On the other hand, if the agency wishes to retain the possibility of a criminal prosecution arising out of an investigation, considerations of fair notice and consistency suggest that the agency should, to the extent practicable, allow the subject of its investigation to obtain the sort of legal representation generally at work in criminal investigations. This system mirrors the likely expectations of regulated parties, yet allows the government to carry out effective investigations. It forms the basis for the discussion that follows.

II. Investigations of Regulated Parties

When an agency tries to gather information about regulated parties, its representative may approach the parties themselves or they may go to third parties. These attempts to collect information occur in several formats, including informal interviews conducted by agency investigators, subpoenaed testimony before agency officials, and requests for production of documents.

A. Participation of Counsel in Witness Interviews

Agencies will periodically ask a person to submit to an interview or to testify in an investigative proceeding, prior to the initiation of any formal agency enforcement proceedings. They also typically have the power to compel the witness to provide the interview or testimony. Agencies make these requests with little guidance from the APA or enabling statutes about the proper procedure to follow.

The APA does not deal at length with "investigative" proceedings.[14] An agency hoping to obtain the statements of private parties might choose to send officials out into the field to obtain voluntary statements,[15] or it might subpoena an individual to appear before an agency representative.

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[14] Section 555(c) of the APA mentions "investigative act[s] or demand[s]" such as inspections or requirements of a report. The same section also refers to "non-public investigatory proceedings" that could include a transcript of testimony.

Section 555(b) of the APA provides for a right to counsel once a person is subpoenaed to testify:

> A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.[16]

The statute distinguishes between a "person," who may be represented by counsel only when compelled to appear, and a "party," who may decide on her own to appear with counsel in an agency proceeding. Some agencies, including the IRS, have in the past argued that only parties are entitled to counsel in investigatory proceedings. However, there is universal agreement now that the plain statutory language extends to non-parties compelled to testify.[17]

Under § 555(b), counsel may "accompany," "represent," and "advise" the person. This language, while providing some guidance, does not settle exactly how counsel might participate in the proceedings. When attorneys have from time to time attempted to take active part in investigative proceedings, agencies have been forced to decide exactly what forms of lawyer participation they should allow.

Under the statute, it appears that counsel must remain free to observe the proceedings and to advise the witness at any point along the way. The statutory provision that an attorney may "accompany" and "advise" the person clearly extends this far. Some counsel attempt to provide more active representation than observation or advice to the client, hoping to create or shape the administrative record during the investigation. Agencies have more leeway to limit attorneys in this setting, and can restrict the ability of counsel to create a record during the investigative proceeding. In *Commissioner v. Schreiber*,[18] the court confirmed the power of an agency to prevent counsel representing a witness from objecting to questions, cross-examining witnesses or calling witnesses.

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[15] *See* United States v. Murray, 297 F.2d 812, 821 (2nd Cir. 1962) (no right to counsel during voluntary statements made to the IRS, those not made under compulsion or subpoena); Suess v. Pugh, 245 F. Supp. 661 (D.W.Va. 1965).

[16] 5 USC §555(b).

[17] United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949).

[18] 329 F.2d 517 (9th Cir.), *mod. on other grounds*, 381 U.S. 279 (1964).

While the APA gives counsel such powers in adjudicatory proceedings, this form of participation need not be allowed in investigative proceedings.[19]

Even though the APA allows the agency to limit the attorney's role during investigations to that of an observer and advisor, some agencies have chosen to promulgate rules allowing more than this. Some regulations authorize attorneys to ask for clarifications of questions or to make statements for the record in an investigative proceeding. For instance, a regulation of the FDIC allows attorneys during investigations to question the witness briefly at the end of the testimony," for clarification purposes."[20]

Agencies routinely retain the power to exclude attorneys who obstruct the orderly conduct of proceedings. Agencies may promulgate rules for such occasions,[21] or they might simply issue an order if authorized by statute. Common types of obstructive behavior by attorneys include shouting at witnesses, insulting the agency representative presiding at the hearing, frequent interruptions of testimony, or preventing witnesses from answering questions.[22]

The obstructive behavior may include efforts to delay the proceedings without overtly disrupting the proceedings. For instance, in *SEC v. Suter*,[23] the agency refused to grant a continuance of an agency proceeding where the witness had obtained several prior continuances after replacing his chosen counsel at the last moment.

A different question arises when an attorney for one party wishes to observe the investigative proceedings involving another party. Statutes granting agencies subpoena power usually authorize them to conduct an interview with nobody present except for counsel and agency representatives.[24] Alternatively, the agency could choose to hold an investigative "hearing" open to the public and compel the person to testify at this hearing.[25] Either of these routes is consistent with the APA, and the statutes granting subpoena power to the agency typically do not limit the agency's choices between these alternatives.

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[19] *See also* Hannah v. Larche, 363 U.S. 420 (1960) (Civil Rights Commission, court upholds limitations on cross-examination in investigative hearings); Avesta AB v. United States, 689 F. Supp. 1173, 1189 (C.I.T. 1988).

[20] 12 CFR §308.148(b)(2) (1992) (FDIC procedure); *see also* 57 Fed. Reg. 33133, 33135 (July 27, 1992) (similar proposed rule of Resolution Trust Corporation).

[21] 57 Fed. Reg. 33133, 33136 at §1625.8 (July 27, 1992) (RTC proposed regulation allowing RTC to exclude attorney from any investigation for "dilatory, obstructionist, egregious, contemptuous, or contumacious conduct"); 17 CFR §203 (1992) (SEC).

[22] *See* Great Lakes Screw Corp. v. NLRB, 409 F.2d 375 (7th Cir. 1969) (describing obstructive behavior by counsel, but placing heavier burden on agency to give specific examples of such behavior before excluding counsel).

[23] 732 F.2d 1294, 1302 (7th Cir. 1984).

[24] 15 USC §1914(a)(1) (DOT employees may issue subpoenas in investigations, motor vehicle bumper standards); §1990d(c)(1) (odometer requirements).

[25] 17 CFR §§203.4, 203.5 (1991) (SEC formal investigative proceedings).

One need not search far for reasons to hold a non-public investigatory interview. The investigators may believe that if their interests and lines of inquiry become generally known to those who might be interviewed in the future, the investigation would be less successful. Public meetings may also prove less convenient because of the facilities that might become necessary. Courts have time and again upheld agency decisions to conduct non-public investigative interviews.[26]

A comparison of these limitations on the participation of counsel to similar areas in criminal practice does not reveal any areas of concern. Although counsel can be present and offer advice to clients during investigative events such as custodial interrogations or certain eyewitness identification procedures, they may not insist on asking clarifying questions or otherwise placing objections or evidence before the investigators. Indeed, attorneys representing grand jury witnesses in the federal system may not even accompany their clients into the grand jury room. By comparison, the ability of counsel to participate in administrative proceedings—regardless of whether they result in civil or criminal sanctions—is at least as broad.

B. Participation of Auxiliary Personnel

The APA does not resolve the question of whether a person may be represented by a non-lawyer during investigative proceedings. The right to counsel provisions of §555(b) seem to give conflicting guidance on the question of representation by non-lawyers. The statutory right to counsel for persons compelled to appear before an agency only extends to any "other qualified representative" if "permitted by the agency." On the other hand, the statute pointedly refuses to address the rights of non-lawyers to represent parties before an agency.[27]

1. Non-lawyers as sole representatives

Some agencies, such as the Social Security Administration, allow non-lawyers to represent parties during adjudicative proceedings. It is less common for non-lawyers to participate during investigatory proceedings, but it does occur on occasion. Once an agency passes regulations or policy statements regarding the representatives it will allow to attend investigative proceedings, it must abide by those regulations even though they are not required by statute. In *Trinity Industries, Inc. v. Dole*,[28] OSHA sought to interview employees during an investigation after an accident. All the employees, who were Hispanic, wanted a company supervisor to serve as translator and wanted another company representative present to prevent confusion by OSHA questions. OSHA subpoenaed the employees and prevented the company representatives from attending, despite a Field Manual provision calling for investigators to allow company representatives to attend interviews if the employee desired. The court required OSHA to abide by the provisions of its Field Manual.

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[26] *See* Int'l Union, UMW of America v. Martin, 785 F. Supp. 1025 (D.D.C. 1992) (upholds decision of Mine Safety and Health Administration during investigation of mine explosion to exclude union representatives from interviews conducted away from mine; interviewees had representatives of their own choosing present at all times).

[27] 5 USC §555(b) ("This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding."). Perhaps the first clause described in the text addresses the rights of the target, while the clause noted here addresses the question from the point of view of the representative and prevents any inferences regarding APA-imposed qualifications for advocates.

At this point, there does not seem to be any reason to recommend any substantial changes in agency practice regarding party access to non-attorney support personnel. The APA gives the agencies discretion—albeit through seemingly contradictory clauses—to decide whether parties may be represented solely by non-attorneys. Several agencies have passed rules or policy statements allowing such representation, and parties have been able to obtain judicial enforcement of such rules without great difficulty. Given the lesser expense to parties of hiring a non-attorney representative, it might be desirable if more agencies explicitly allowed this type of support for parties during investigations.

2. Personnel to Assist Counsel

Another set of disputes has revolved around the presence during an interview of persons to assist the witness' attorney. Sometimes a person or organization involved in an investigation by the IRS or the SEC will desire an accountant or other financial analyst to be present along with the lawyer during a proceeding. At least one court has compelled the agency to allow for the presence of an accountant during an investigative interview. Even though the APA deals only with the right to legal counsel, the court in *SEC v. Whitman*,[29] considered the accountant's presence to be an indispensable part of the right to counsel in that case. The opinion emphasized the importance of technical advice in certain types of inquiries; without it, counsel cannot provide effective representation.

This same line of reasoning might extend to a number of settings where technical assistance might be important, even indispensable, to an attorney during an investigative interview. For instance, engineering or scientific advice may be necessary during an environmental investigation or an interview regarding a nuclear facility. Perhaps the issue has not arisen in these settings because the witness him or herself can usually provide the relevant technical information to the lawyer. However, where the witness cannot personally provide the attorney with an adequate technical background, access to such information is an indispensable part of providing competent legal advice.

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[28] 760 F. Supp. 1194 (N.D.Tex. 1991).

[29] SEC v. Whitman, 613 F. Supp. 48, 49 (D.D.C. 1985).

Courts have been less receptive to attempts by witnesses and their attorneys to bring their own stenographers into the interviews. By and large, the courts agree that the APA allows the agency to exclude private stenographers. On the other hand, where the agency uses a subpoena to compel attendance at an investigatory hearing, statutes typically require the creation of a transcript,[30] and §555(c) of the APA gives witnesses the right to obtain a copy of that transcript.[31] Thus, the refusal to allow a private stenographer in an investigative interview compelled by subpoena does not provide the witness with anything of true value, since the government must provide the transcript anyway. Denying access to a private stenographer may simply protect the government from the logistical difficulties of dealing with an unfamiliar stenographic service.

The agency may resist allowing experts such as accountants or engineers into an interview because of concerns about the confidentiality of their investigative strategy or techniques. The expert may be able to help the witness anticipate the agency's concerns or suspicions. Alternatively, the agency may be concerned about the delay involved if an attorney must consult frequently during an interview with an expert before questioning may proceed.

Despite these reasons for agencies to disfavor the use of auxiliary personnel by witnesses, there does not appear to be any evidence of any widespread difficulties in this area. Apparently, parties do not often seek to bring such auxiliary personnel into an interview. Certainly there are very few judicial decisions on the subject. Moreover, the growing resort to criminal sanctions does not yet seem to be causing parties to request auxiliary personnel more frequently. On those rare occasions when a party tries to bring auxiliary personnel into an interview and the agency objects, there is generally some way to assure reasonable access to the technical expert, who can remain nearby without being physically present during the interview.

Analogues from more traditional criminal investigations do not provide a compelling argument for narrowing agency discretion on this question. While it is true that the constitutional right to counsel during a criminal trial may in some settings include access to certain expert opinion for the defendant,[32] that expertise may not be available to the criminal defendant earlier in the investigative process. The witness in an administrative investigation is also different from the criminal defendant at trial because he or she will often have some personal expertise on the subject of the interview, or will be able to prepare for the interview by consulting with others who are experts within the same organization.

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[30] *Cf.* United States v. Murray, 297 F.2d 812 (2d Cir. 1962) (no transcript required in informal investigative interview not compelled by subpoena).

[31] Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1952) (witness testifying in non-public investigatory proceeding may not bring in stenographer, but may obtain copy of agency's transcript under 5 USC §555(c)); In re Neill, 209 F. Supp. 76 (S.D. W.Va. 1962); but *see* Mott v. MacMahon, 214 F. Supp. 20 (N.D. Cal. 1963) (nothing in IRC to prevent presence of private stenographer).

[32] Ake v. Oklahoma, 470 U.S. 68 (1985) (indigent defendant who plans to make sanity a significant factor at trial must have access to competent psychiatrist to assist in defense).

Given the lack of evidence that agencies and parties are coming into conflict on this question, this report makes no recommendation for a change in agency practice. Agencies should keep in mind, however, that informed legal advice in complex regulatory areas will often be impossible without some ability to consult experts. If requested by the interviewee, the agency investigators should provide opportunities for attorneys to obtain such necessary background information, either by consulting an expert present during the interview, or by stopping the proceedings for a brief period to allow consultation with an expert elsewhere. Adequate notice regarding the subject matter of an interview may also allow the attorney to obtain such background information prior to the interview. However it is accomplished, the agency investigators must remain aware that a witness' access to counsel is meaningful only if the attorney has an opportunity to obtain the background technical expertise sometimes necessary when dealing with complex regulatory matters. Of course, the party—not the agency—would be responsible for providing the expert assistance to the party's attorney.

C. Selection of Counsel

An issue that has created controversy more recently involves the selection of counsel by the witness. The right to counsel in the APA is generally construed to mean the right to counsel of one's choice.[33] Yet some agencies have attempted to place restrictions on multiple representation of interviewees by the same attorney. These agencies, including the Internal Revenue Service, the Securities Exchange Commission, the Nuclear Regulatory Commission, the Federal Deposit Insurance Corporation, and the Resolution Trust Corporation,[34] all take statements from witnesses with their counsel present. In some cases, the investigation could lead to civil or criminal sanctions against a company or its employees, or both. Where a company under investigation offers its employees the services of the same attorney who represents the company, these agencies have reserved the right to insist, under some circumstances, that the witness choose some other attorney.

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[33] Baker v. Comm'r of Internal Revenue, 275 F.2d 141 (5th Cir. 1960); United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949).

[34] 10 CFR §19.18 (1990) (NRC attorney exclusion rule).

1. Agency Interests in Preventing Multiple Representation

Multiple representation of witnesses by one attorney could create several problems for the investigation. First, an attorney representing both employees and their company can keep management informed of any damaging statements the employees might make.[35] An employee who knows that her statements will be passed along to the company's management might be less inclined to provide any information about wrongdoing on the part of herself or others.

Second, the attorney with multiple clients can keep close watch over the course of the questioning and anticipate the government's concerns and investigative strategy. They could shape the witnesses' preparation for subsequent interviews in light of this knowledge. Where an early interview provides inadequate information to establish a violation, employees in subsequent interviews might be subtly inclined to conform their testimony—consciously or unconsciously—to the earlier harmless testimony of other witnesses. Without the ability to surprise a witness, the agent might be less able to elicit complete information.

Similar concerns are present in the grand jury context when one attorney represents several employee witnesses and their employer, a target of the investigation. However, the impact of multiple representation is somewhat blunted in grand jury proceedings, because counsel cannot be present during questioning, and must rely on the candor and memory of the witness to reconstruct the line of questioning and the answers given.

2. History of Federal Agency Efforts to Limit Multiple Representation

Agencies have generally dealt with the problems of multiple representation on a case-by-case basis. They might negotiate informally with defense counsel to avoid certain types of conduct that concern the agency, or the agency might issue an order requiring selection of new counsel in a particular case.[36] Such decisions come under judicial scrutiny when the witness refuses to comply with a subpoena after the agency excludes the witness' chosen counsel, and the agency must seek enforcement of the subpoena in court.[37]

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[35] Under the Model Code of Professional Responsibility, the attorney may give information from one client to another if the client giving the information consents. It might prove awkward for an employee, who wants to avoid seeming disloyal to the company or to antagonize counsel who is provided by the company, to insist that all statements be kept from the company.

[36] *See* Mississippi River Corp. v. FTC, 454 F.2d 1083, 1093 (8th Cir. 1972) (agency order prohibiting witness from conferring during recess with counsel also representing company, parties had not disclosed multiple representation to agency).

[37] Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1952); United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949).

Some agencies have passed rules on this topic rather than dealing with multiple representation on a case-by-case basis. Thus far, courts have invalidated aspects of most of these rules. The Internal Revenue Service adopted what was perhaps the first general agency policy regarding multiple representation. In a manual for its agents, the agency announced the following policy: "a third party witness is entitled to attendance of his own counsel, but not the counsel for the taxpayer." The policy came under judicial scrutiny on several occasions. Twice, courts refused to permit the IRS to exclude an attorney, because the APA protects a witness' power to select his own attorney.[38] A court enforced the agency's decision to exclude counsel only where the agency complained that counsel was in fact obstructing an orderly inquiry process by improper conduct and tactics.[39] The investigative procedures of the IRS no longer instruct agents to exclude counsel representing both the taxpayer and a witness.

The Securities Exchange Commission made one of the earliest attempts to promulgate a regulation regarding exclusion of counsel from investigative interviews. The SEC regulation barred the presence in investigative interviews of attorneys who represented multiple witnesses, unless permitted "in the discretion of the officer conducting the investigation."[40] In the first reported challenge to this rule, the court in *United States v. Steel*,[41] held that the agency's decision to exclude corporate counsel from an interview of another client, a corporate employee, was not a violation of the APA statutory right to counsel. The limitation on selection of counsel was considered "reasonable" because the witness had adequate time (one week) to select some other counsel.

However, the first appellate court to review the SEC's rule, the Ninth Circuit in *SEC v. Higashi*,[42] refused to enforce it. In that case, a corporate director was subpoenaed to appear at an investigative hearing, and chose as his counsel the attorney representing the corporation under investigation. While recognizing the importance of the agency being able to hold an investigative hearing not open to other witnesses or their attorneys, the court decided that the witness should be able to select the corporate attorney to represent him. This was appropriate because the interests of the corporation and the director corresponded to a large extent, and because it would be expensive for new counsel to become familiar with the complex background of the case.[43]

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[38] Baker v. Comm'r of Internal Revenue, 275 F.2d 141 (5th Cir. 1960); United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949).

[39] Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1952) (attorney representing taxpayer and employee witness was brother of taxpayer, and government agents were "put to much delay, trouble, and expense by the actions of the taxpayer's attorney.").

[40] 17 CFR §203.7(b) (1976).

[41] 238 F. Supp. 575 (S.D.N.Y. 1965).

[42] 359 F.2d 550 (9th Cir. 1966).

[43] *Id.* at 553.

The court in *SEC v. Csapo*,[44] specified further the limits of an agency's ability to exclude the counsel chosen by a witness. SEC investigators had prevented Csapo's attorneys from attending an interview because the same attorneys were representing eight other witnesses in the investigation, and had already attended the lengthy interview of one of their clients. The court held that exclusion of counsel was inconsistent with the APA right to counsel unless the exclusion was based upon some "concrete evidence" that multiple representation of witnesses by one attorney would impede an investigation. Evidence that company officials encouraged some witnesses to accept the company's choice of attorneys, and that the company paid the attorneys' fees, was not enough to meet this standard.[45] The mere fact of multiple representation was also inadequate. An agency may inform witnesses of possible conflicts of interest on the part of their attorneys, but it may not exclude counsel based on "speculation" that counsel could frustrate the investigation.[46]

A rule issued in January 1990 by the Nuclear Regulatory Commission limited agency discretion more than the earlier SEC rule did. It gave the agency official conducting an inquiry the power to determine that a "reasonable basis exists to believe that the investigation or inspection will be obstructed, impeded or impaired, either directly or indirectly, by an attorney's representation of multiple interests."[47] Upon making this finding (in consultation with the Office of the General Counsel), the official could bar that attorney from the interview. The interviewee could appeal this decision to the Commission itself, and ultimately to federal court.[48] If the exclusion remained in effect, the interviewee could postpone the interview while obtaining new counsel.[49]

When industry representatives challenged the rule in *Professional Reactor Operator Society v. NRC*,[50] the D.C. Circuit overturned the rule because it allowed exclusion to take place where there was only a "reasonable basis" to believe the investigation would be obstructed. Since the "reasonable basis" standard was less exacting than the "concrete evidence" required under *Csapo*, the *Professional Reactor* court decided that the NRC's rule was inconsistent with the unequivocal right to counsel provided by the APA.

Following the *Professional Reactor* decision, the NRC proposed an amendment to its attorney exclusion rule by requiring "concrete evidence" rather than a "reasonable basis" to believe the attorney's presence would obstruct or impede the investigation.[51] Although the Federal Register notice of proposed rules did not specify the agency's definition of "concrete evidence," it did identify some relevant evidence in making that decision. The notice conceded that mere multiple representation or vigorous advocacy by competent counsel would not be sufficient grounds for an exclusion. On the other hand, "evidence that the employee had a concern that his employment would be jeopardized by transmittal of information from the interview to the [employer]" might qualify as concrete evidence. The agency also identified a potentially more far-reaching basis for showing concrete evidence: "It would also be relevant if there were evidence that the multiple representation would lead to disclosure of the substance of an interview to a future interviewee or subject in the investigation and that this disclosure would have an adverse impact on the investigation."[52]

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[44] 533 F.2d 7 (D.C. Cir. 1976).

[45] *Id.* at 10-11. The court recognized the power of the agency to discipline attorneys for improper solicitation of clients, but found that the allegations of solicitation remained unproven.

[46] The SEC retains its attorney exclusion rule, but apparently no longer invokes it to exclude counsel based on multiple representation. 17 CFR §203.7(b) (1991).

[47] 10 CFR §19.18(b), reported at 55 Fed. Reg. 247-48 (1990).

[48] 10 CFR §19.18(d) (1991).

[49] 10 CFR §19.18(e) (1991).

[50] 939 F.2d 1047 (D.C. Cir. 1991).

The proposed rule has now become final.[53] In the statement accompanying the final rule, the NRC conceded that "the mere sharing of information provided by an interviewee to a subsequent interviewee" would not, standing alone, be a sufficient basis for excluding counsel. However, the NRC insisted that such evidence could support the exclusion of an attorney if there is also evidence (based on something more than speculation) that the information to be shared is important enough to interfere with the investigation.

More recently, the Federal Deposit Insurance Corporation has promulgated a rule that allows FDIC investigators to respond to "perceived or actual" conflicts of interest arising when an attorney represents multiple witnesses.[54] The rules allow an ALJ to take "corrective measures" to prevent the conflict of interest, including an order limiting the scope of representation.[55] In every case of multiple representation, counsel and the witness must certify that (1) the attorney has fully discussed the possible conflict with all the clients involved, (2) the clients know of no material existing conflict, and (3) the clients waive any right to challenge the agency proceedings based on any conflict that may arise.

The Resolution Trust Corporation has followed the lead of the FDIC. It has proposed a rule that would allow the RTC to disqualify an attorney or law firm from representing multiple witnesses in an investigation if there is a "perceived or actual conflict of interest."[56] The investigating official for the agency, acting alone, could require an attorney representing multiple witnesses to make the certification described above. The rule gives the RTC power to "take corrective measures at any stage of an investigation" to cure a conflict of interest.

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[51] 56 Fed. Reg. 65,951 (Dec. 19, 1991).

[52] 56 Fed. Reg. at 65950.

[53] 57 Fed. Reg. 61780 (Dec. 29, 1992) (codified at 10 CFR §§19.3, 19.18(b)-(e)).

[54] 12 CFR §308.148(d), 308.08 (1992) (adopted August 9, 1991).

[55] It is not clear which agency official makes this decision during an investigation. Section 308.148 empowers the person conducting the investigation to "require the attorney to comply with the provisions of §308.08." Section 308.08 provides for certification and waiver regarding a conflict of interest, and empowers the ALJ to take corrective measures. One possible reading of §308.148 is that the person conducting the investigation will carry out the corrective measures described generally in §308.08.

The FDIC and RTC rules are interesting, first, because they identify conflicts of interest—rather than impeding an investigation—as the problem. They also seem to depart from other rules of this genre, because a "perceived or actual conflict" appears to be a less onerous burden of proof on the agency than the "concrete evidence" courts have required of other agencies.

3. Nature of Showing Necessary to Exclude Counsel: An Analogy to Grand Jury Practice

The exact nature of the "concrete evidence" that the government must show before excluding counsel from an agency investigative proceeding is still unclear. The facts of *Csapo* and the handful of other cases on this subject discussed above provide only a few clues. Courts and agencies might flesh out the meaning of this standard by looking to the grand jury context. Where the government has tried to prevent an attorney from representing multiple witnesses before a federal grand jury, courts have required the government to provide some "concrete evidence" that the multiple representation will interfere with the investigation.[57]

When the government makes a motion to disqualify counsel who represents multiple grand jury witnesses or a witness and a target, the court will occasionally grant the motion even though the witness desires to retain counsel despite the conflict of interest.[58] The courts explain that they do so to protect the investigative ability of the grand jury, as well as the interests of the witness.[59] However, courts have been very reluctant to invoke this "extreme" remedy.[60]

Admittedly, some early case law suggests that a court should retain broad discretion to disqualify counsel for a grand jury witness to prevent conflicts of interest and impediments to the investigation.[61] However, most courts over the last fifteen years have made it very difficult for the government to disqualify counsel chosen by a grand jury witness. Before disqualification can occur in the grand jury setting, the government must show that there is a "serious potential for conflict" of interest.[62]

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[56] 57 Fed. Reg. 33133, 33135 at §1625.7(b)(2)(ii) (July 27, 1992).

[57] Although the phrase "concrete evidence" appears regularly in grand jury disqualification cases, *see* In re Grand Jury Proceedings (Doe), 859 F.2d 1021 (1st Cir. 1988), it does not appear in every case.

[58] *See* In re Grand Jury Investigation, 436 F. Supp. 818 (W.D.Pa. 1977).

[59] Matter of Special February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978).

[60] Matter of Investigative Grand Jury Proceedings on April 10, 1979 and Continuing, 480 F. Supp. 162 (N.D. Ohio 1979) (enumerating lesser remedies).

[61] United States v. Gopman, 531 F.2d 262 (5th Cir. 1976).

Courts have refused to disqualify attorneys when the government suggests that one witness could potentially give testimony damaging to another client.[63] Nor does it suffice for the government to allege generally that employee witnesses have an incentive to be less than forthcoming about the violations of their employers.[64]

A serious potential for conflict is established most commonly in the grand jury setting when a grant of immunity to one witness makes that person likely to testify against another client of the same attorney.[65] Moreover, there must be some specific indication that the immunized testimony of one client will in fact incriminate or adversely affect the other client.[66] Where an attorney represents some witnesses designated as targets of the investigation, along with other witnesses who are granted immunity and are declared not to be targets, those facts may combine to provide the necessary evidence of a potential conflict.[67]

These inquiries into the likely subjects of a witness' testimony, and the likelihood that a witness will testify despite the Fifth Amendment self-incrimination privilege, all focus attention on the *incentives* of a witness rather than the actions of a witness or an attorney. Hence, the government does not have to wait until the damage is done before it can successfully exclude counsel for a grand jury witness.

On the other hand, the courts have commonly relied on two factors—the witness' status as a target or non-target, and the use of immunized testimony—in an effort to identify cases where the incentives for a witness or attorney to damage the investigation or the interests of another party are exceptionally clear and strong. While many witnesses wish to preserve a good relationship with an employer who is providing legal counsel, and many witnesses could potentially provide testimony damaging to other clients of the same attorney, something more exceptional must be present to justify an exclusion in rare cases.

Agencies generally do not and cannot offer a grant of immunity to witnesses testifying in an agency investigation. Hence, one of the clearest indications of a witness' incentives is not available in the agency context as it is for grand jury matters. Some other factor must be present, then, to make an exceptional witness stand apart from the universe of employee witnesses represented by employer-provided counsel. If the witness volunteers some hesitation about providing candid testimony, that should certainly suffice. If the "concrete evidence" standard is to be interpreted consistently with the case law in the grand jury context, the focus must remain on finding factors beyond the fact of an employment relationship or the fact of multiple representation, factors making a witness unusually threatening to the investigation.

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[62] In re Grand Jury Proceedings (Doe), 859 F.2d 1021 (1st Cir. 1988) (applying standard from Wheat v. United States, 486 U.S. 153 (1988), for disqualification at trial, to grand jury proceedings).

[63] In re Taylor, 567 F.2d 1183 (2d Cir. 1977).

[64] *See* In re Special Grand Jury, 480 F. Supp. 174 (E.D.Wis. 1979) (all witnesses represented by one attorney claim no memory of events in question, not adequate showing of conflict without facts suggesting their answers would be different if represented by different counsel).

[65] Matter of Special February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978); In re Grand Jury Investigation, 436 F. Supp. 818 (W.D.Pa. 1977).

[66] In re Special February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978).

[67] In re Investigative Grand Jury Proceedings on April 10, 1979 and Continuing, 480 F. Supp. 162 (N.D. Ohio 1979).

4. Procedural Challenges to Attorney Exclusions

Although the courts addressing the agency practice of excluding certain counsel have focused on the justification that the agency must give before interfering in the witness' selection of counsel, there are other potential grounds for challenging the legality of the practice. For instance, the identity of the agency decisionmaker might be the basis for a challenge to exclusion rules. When government prosecutors wish to disqualify counsel for a grand jury witness, they must obtain the assent of the judge supervising the grand jury. Similarly, under the RTC's proposed exclusion rule, the RTC itself—rather than the investigating officer—decides whether to exclude an attorney representing multiple witnesses. Under both the SEC and NRC exclusion rules, however, the agency investigators themselves make the initial decision whether to exclude counsel for a witness.[68]

Assuming that the APA creates a property or liberty interest in having counsel of one's choice, one might argue that due process requires a neutral official to decide whether to deprive the witness of that interest. The ability to appeal the decision of the investigator higher up within the agency, or ultimately in court, might satisfy such a due process requirement, at least if the appellate panel had plenary power of review.

5. Strategic Reasons for Agencies to Exercise Sparingly Any Discretion to Exclude Counsel

Aside from the question of whether attorney exclusion is legally permissible, there is a serious question whether it can effectively safeguard an investigation. To begin with, there are statutes prohibiting obstruction of justice. Those statutes could lead, in extreme cases, to prosecution of an attorney or a witness who willfully misleads agency investigators.[69] In addition, statutes governing some industries, such as the nuclear power industry, prohibit any employer retaliation against an employee who reports wrongdoing.[70] Such a statute might give some assurance to the witness asked to provide information of employer wrongdoing while a company representative is present.

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[68] Under the similar rules of the FDIC, an investigator may require certification of no conflict of interest during an investigation, and may perhaps disqualify counsel. These regulations might be read, however, to allow only an ALJ to exclude the attorney from an investigative interview. 12 CFR §308.148, 308.08 (1992).

To be sure, these statutes will not prevent all the problems associated with multiple representation. Often the proof of such conduct will be difficult to obtain, or once obtained may be insufficient to establish the government's case beyond a reasonable doubt. But if the more subtle forms of interference with investigations are the real problem, they will likely continue to plague an investigation even after the agency forces the witness to choose new counsel. So long as an employer pays the fees of the attorney representing the employee witness, that attorney will have some reason to share information and cooperate in other ways with corporate counsel. The witness, as well, has a continuing incentive to cooperate with the plans of her employer, so as to confirm her loyalty and value to the company.

These practices pose the same threats to the investigation as multiple representation. They could only be eliminated through draconian measures, such as a prohibition on sharing information among witnesses or attorneys before or after an interview. An agency unwilling to go this far is unlikely to accomplish the objectives of an attorney exclusion rule.

The ability of investigators to limit a witness' choice of counsel may be perceived as an unfair advantage for the agency. It restricts a choice generally open to those being investigated by the government, while providing little if any tangible benefit to the government. These perceptions become especially acute in a setting where the administrative investigators seem to focus on potential criminal violations. Although agencies are typically responsible for improving health and safety or other worthy public goals, they must, whenever possible, pursue those goals without creating the perception of injustice.

An agency implementing the "concrete evidence" standard for exclusion of counsel, or some other standard such as "perceived or actual conflict" for the FDIC and RTC, must look for truly extraordinary cases. They must recognize that many (probably most) witnesses will genuinely want the counsel representing them, even though the attorney represents other witnesses or targets in the investigation. They must also concede that much information presented in one interview will be shared with other witnesses and targets, because their attorneys are coordinating their efforts. When the only harm is sharing information, there is nothing extraordinary enough to warrant an exclusion. When the only reasons to fear that a witness will not be candid are based on an employment relationship or multiple representation by an attorney, once again nothing extraordinary has taken place. For the most part, agencies should not attempt to exclude counsel unless there is evidence that would suffice to exclude counsel in the grand jury setting.

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[69] *See* 18 U.S.C. §1001 (false statements); §1505 (obstruction of proceedings before agencies); §1510 (obstruction of criminal investigations); §1622 (subornation of perjury).

[70] 29 U.S.C. §660(c) (1988) (protection from discharge for employee reporting workplace safety violations to OSHA); 42 U.S.C. §5851 (1988) (protection from discharge for utility employee reporting violations of atomic energy safety statutes). There are also state statutes providing protection to whistleblowing employees in some contexts (although usually limited to public employees). *See* Littman v. Firestone Tire & Rubber Co., 715 F. Supp. 90 (S.D.N.Y. 1990) (construing New Jersey Conscientious Employee Protection Act).

D. Informing Witnesses about Access to Counsel

Where an agency compels a witness to testify in an investigatory proceeding, the APA right to counsel should eliminate any need to inform the witness of his or her various rights during the proceeding. So long as the agency makes the subpoena recipient aware of the right to counsel, no other notice should be necessary. Agencies tend to inform subpoenaed witnesses of their right to counsel, although it is not clear that they are legally compelled to provide this notice.

Where the agency approaches a witness for a voluntary interview, there is no statutory or constitutional right to counsel. Further, because the witness is not in custody in any sense during the voluntary interview, the government is not obliged to notify the witness of his or her privilege against self-incrimination. The warnings prescribed in *Miranda v. Arizona*[71] do not apply in this non-custodial setting.[72]

Although there may be no legal requirement to notify a witness of a right to counsel or the privilege against self-incrimination,[73] some agencies choose to provide such warnings routinely.[74] This practice accords with the analogous policy of the Department of Justice to inform grand jury witnesses of their privilege against self-incrimination and their right to counsel. Witnesses receive this notice both in their grand jury subpoena and at the outset of their grand jury testimony. Although it is doubtful that this notice is a constitutional requirement, it is a routine practice of the Department of Justice.

It is difficult to imagine any reasons why an administrative agency would truly need to withhold such warnings, since they operate with so little controversy in federal grand jury practice. Investigators might depend on the ignorance of witnesses about their statutory right to counsel, and hope that they will provide more information than they otherwise would if represented by counsel. Such sharp practices, however, will appear unseemly to many, will invite controversy, and may not be worth the minimal benefits to an investigation.

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[71] 384 U.S. 486 (1966).

[72] *See* Mirscheli v. Zampano, 201 F. Supp. 373, 376 (D.C.D.C. 1962) (in an voluntary investigative interview, the party investigated does not have to be informed of his right to have the advice of counsel).

[73] United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F.2d 532, 543 (8th Cir. 1981).

[74] *See* U.S. Dept. of Interior, Inspector General Manual 844.4 (1988); Internal Revenue Manual §9781. The Inspector General's office in the Department of Defense is another example of an agency following this practice.

E. Providing Information about the Investigation that Affects Legal Representation

There are also a few pieces of information about agency investigations that have a profound effect on the witness' decision to retain counsel, and on the attorney's ability to represent the witness. For instance, an attorney preparing for a proceeding will often find it critical to learn precisely what the client said at a past investigative proceeding. Under the APA, a witness who is compelled to submit data or evidence may procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.[75] In practice, agencies have allowed all witnesses, including those who participate in "nonpublic investigatory proceedings," to obtain copies of their testimony.[76]

The only source of controversy concerning transcripts involves the timing of the release of a transcript. The criminal discovery provisions of the Federal Rules of Criminal Procedure, along with the Jencks Act, require the government to release grand jury testimony of the defendant and prosecution witnesses before the defense puts on its case.[77] By analogy, agencies could at the very least provide transcripts to witnesses before they are called upon to defend themselves against adverse administrative action.

A witness might also find it valuable to know whether testimony is at all likely to lead to criminal sanctions against the witness. Once witnesses realize that criminal charges against them are a realistic possibility, one can surmise that the advice of counsel will become far more important to them. Knowledge about the government's intent regarding criminal charges also has a direct bearing on the selection of counsel. Such information can assist a witness in deciding whether to accept an offer by some other party to provide counsel. It may reveal the likelihood of a conflict of interest arising where the attorney represents multiple witnesses.

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[75] 5 USC §555(c) (1988).

[76] *See* 17 CFR §203.6 (1991) (SEC grants access to transcripts); 26 CFR §601.107(b)(1) (IRS).

[77] Federal courts have held that grand jury witnesses other than those who ultimately become defendants or witnesses at a criminal trial do not have the right to inspect their grand jury testimony. In re Application of Executive Securities Corp., 702 F.2d 406 (2d Cir.), cert. denied, 464 U.S. 818 (1983); United States v. Clavey, 565 F.2d 111 (7th Cir. 1977) (en banc), cert. denied, 434 U.S. 1070 (1978).

There is generally no legal requirement that agencies notify witnesses or others of their status in an investigation. In *SEC v. Jerry T. O'Brien, Inc.*,[78] the target of an SEC investigation argued that the agency was required to notify it of any document subpoenas issued to third parties, to allow a challenge to the sufficiency of those subpoenas. The Supreme Court held that the SEC had no duty to inform the target of any third-party subpoenas. The opinion also implied that the agency had no legal obligation to inform parties that they were themselves "targets," since it might prove difficult to define a target, and might create opportunities to obstruct justice or otherwise frustrate the investigation.

Given the discretion allowed to them under the *O'Brien* decision, many agencies do not notify those involved in their investigations of their status as a target or subject. However, a few federal agencies, including the SEC and the IRS, do provide some information of this sort to targets of their investigations.[79]

In federal grand jury investigations, the government attorney routinely notifies those subpoenaed by the grand jury whether they are subjects or targets of the grand jury's inquiry. "Subjects" are those whose activities fall within the scope of the grand jury's inquiry, while "targets" are those whom the grand jury or prosecutor can link to a crime with "substantial evidence," and who might ultimately be charged by the grand jury.[80] Although there may be no constitutional or statutory requirement that the government attorney provide this notice,[81] it is a practice that the government follows in purely criminal investigations out of a sense of fairness to those caught up in a stressful and dangerous situation.

The practice of informing subjects or targets of their status during a grand jury investigation will not translate easily into the context of agency investigations. In many instances, it will be literally impossible for agencies to notify a party about the government's intended use of information, or about the party's status in the investigation. Agencies generally will not know how information gathered during an investigation is likely to be used. Such decisions are generally in the hands of prosecutors at the Department of Justice. Although the agency may decide for itself which cases to refer to the Department of Justice for possible prosecution, it may be relatively late in an agency's investigation before it can make a referral decision. After the referral, the agency may be bound by executive order or other sources of law not to disclose to the person anything about the criminal referral.

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[78] 467 U.S. 735 (1984).

[79] 26 CFR §601.107(b)(2), (c) (1992); Internal Revenue Manual §9781; Handbook for Special Agents §342.132.

[80] U.S. Dept. of Justice, United States Attorneys' Manual §9-11.260 (1984); *see also* United States v. Crocker, 568 F.2d 1049, 1054 (3d Cir. 1977); United States v. Jacobs, 531 F.2d 87, 89 (2d Cir. 1976).

[81] United States v. Wong, 431 U.S. 174 (1977); United States v. Washington, 431 U.S. 181 (1977).

Even when it would be possible for an agency to provide information to a target or subject about the investigation, it may be imprudent to do so. A person learning of the risks of criminal prosecution may flee, tamper with evidence, attempt to influence potential witnesses, or take other action to compromise the investigation. Moreover, a requirement that all agencies must determine when a person faces some particular risk of criminal charges would inconvenience many agencies, and force upon others a decision that their agents have no training or competence to make.

Despite these concerns, there will be limited circumstances when it will be possible to provide to a witness some information about the likelihood of criminal charges. In some cases, it will be apparent from early in the investigation that evidence of criminal violations will probably develop. The assignment to a subdivision within an agency primarily responsible for criminal investigations may in some cases indicate the intentions of the government regarding the persons involved. In other cases, the Department of Justice may express an interest in a case before it is referred for possible criminal charges.

In cases such as these, the agency already knows that a person is unusually likely to face criminal charges. To seek further information from this person under the auspices of an apparently routine administrative investigation would mislead both the person and any counsel involved. There is no constitutional requirement that the government inform the person of the risks he faces; however, the sense of fair play that leads the government to provide notice about target and subject status in the grand jury context also supports the practice of notice when an agency continues to seek information from those whom it knows to be at particular risk of criminal charges. If the agency is concerned that the person will flee or attempt to obstruct justice, it may decide not to approach the person for further information and thereby avoid any need to provide notice.

If the notice to a person depends on an existing agency determination that the person is likely to be referred for criminal charges, it becomes important to know whose determination will be attributed to the agency. A field investigator may have expectations different from senior officials in the agency, and those expectations may develop at different times. Given the difficulty of knowing the expectations of lower level investigators and the need to respect the internal controls in an agency, the expectations of senior officials should control.

III. Investigations of Agency Contractors

Agency investigations are not only directed at regulatory targets or those who have information about violations of the regulatory program. Agencies must also gather information about those who contract with the agency to provide goods and services. This part of the report surveys the special limitations on the right to counsel available to contractors during agency investigations.

This inquiry does not involve nuanced questions of whether the right to counsel is being subtly undermined. The question in this context is whether the subject of the investigation will receive any legal advice at all during the investigative proceedings. The important changes in the availability of legal counsel are explained, at least in part, by the assumption that contractors consent to investigation by the agency.

A. Ambiguous Statutory Support for a Right to Counsel During Questioning

Some, but not all, agency investigators interview contractors and their employees without counsel present.[82] There is reason to ask whether this practice is consistent with the Administrative Procedure Act. Section 555(b) of the APA is phrased ambiguously, but one plausible reading of the statute suggests that those contractors and employees questioned during an investigation should be able to insist on the presence of counsel.

Section 555(b) has two sentences relevant for our purposes here. The first sentence provides that a "person compelled to appear in person before an agency or representative thereof" may be represented by counsel. The second declares that a "party" may appear with counsel in "any agency proceeding." Interpretive difficulties arise under each of the two sentences.[83]

Under the first sentence, the most common form of "compelling" a person to appear before agency investigators would involve a subpoena. Where the interviewee is a contractor, no subpoena is necessary to secure the appearance of the witness. Arguably, therefore, an investigation that occurs without a subpoena would not fall within the reach of the first sentence of §555(b). However, the statute does not mention subpoenas as the exclusive method of compelling attendance of a witness, and contractual terms may force a firm and its agents to choose between attending the interview or being disciplined or losing the contracts. Neither the legislative history nor any case law decided under this statute address the question of whether threatened termination of a government contract would qualify as compulsion that would create a right to counsel.

Under the second sentence in the statute, the difficulty appears in trying to determine if a contractor who is interviewed by the agency investigator is a "party" in "agency proceedings." According to the statutory definition, a party includes a person "named or admitted as a party...in an agency proceeding."[84] The definition of a "proceeding" includes agency rulemaking, adjudication, or licensing.[85]

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[82] Investigators for the Inspector General of the Department of Defense allow contractors to consult with attorneys during interviews.

[83] *See* 3 Kenneth C. Davis, Administrative Law §14.17 (1980) ("Altogether, the APA provision is susceptible of considerable improvement.").

The strongest objection to the use of the second sentence as the basis for a right to counsel for contractors is the definition of "proceeding." An interview during an investigation of a contractor may not qualify as an agency proceeding, because that action does not fit within the ordinary meaning of "rulemaking" or "licensing" or "adjudication." On the other hand, the APA does contemplate that all agency action will fall within one of these categories,[86] meaning that an expansive definition of "adjudication" may be necessary. The practical implications of this expanded definition, however, might be intolerable. Unless there were some way of identifying certain contractor interviews that are "proceedings" and some that are not, the broad reading of this sentence would give an agency contractor a right to counsel whenever the agency takes any action in which the contractor has an "interest."

The legislative history does not untangle the problems presented in the second sentence of §555(b). The House and Senate committees involved in the drafting process stated that a "party" in the second sentence of the statute means "any person showing the requisite interest in the matter...whether or not formal proceedings are available."[87] Since the provision was designed to reach "any exercise of agency authority,"[88] it seems clear that in an investigative interview that could lead to the discipline of the contractor who is being interviewed, the interviewee has the "requisite interest." The proper scope for the term "proceeding," however, does not receive any helpful treatment in the legislative history.

In sum, the case for a statutory right to counsel for government contractors during an investigative interview appears to be stronger under the first sentence of §555(b) than under the second, but questionable under either sentence. If the first sentence did apply, it would grant a right to counsel only where contractual terms operate as the functional equivalent of a subpoena to "compel" the person to appear before an agency representative.

The right to counsel of federal employees during an internal agency investigation turns on many of these same ambiguities of the APA. The general language of the APA might be read to grant a right to counsel to federal employees during an internal investigation. However, provisions of the Civil Service Reform Act of 1978 (CSRA) only allow a federal employee to consult with counsel in limited settings, not including investigative interviews.[89] The CSRA provides for the presence of a union representative for federal employees included in a bargaining unit, but the union representative is not the equivalent of legal counsel.[90] Thus, the silence of the CSRA on this precise subject may indicate that the CSRA does not contemplate a right to counsel during interviews of employees.

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[84] 5 USC §551(3).

[85] 5 USC §551(12), (5), (7), (9).

[86] An "adjudication" means the process for formulating an order, and an "order" means final disposition of "a matter other than rule making." 5 USC §551(6), (7).

[87] 81Sen. Doc. No. 248, 79th Cong., 2d Sess. 205 (1946); *see also id.* at 263-64 (using the same language to describe parties).

[88] *See* id at 205, 264.

Nevertheless, given the general language of the APA and the silence of the CSRA on the precise question involved, there is still some doubt whether federal employees have a statutory right to counsel during investigative interviews they are compelled to attend. Some courts will not presume an amendment to the APA unless Congress clearly states its intention to do so. Courts also interpret statutes to steer well clear of any constitutional violations. For investigations in certain coercive settings, some courts may consider the lack of a right to counsel to be dangerously close to a constitutional violation. Because of the vagaries of statutory construction, it is hard to be confident in a single reading of the APA and the CSRA on this question.

B. Appropriate Scope for a Clarified Right to Counsel

If the APA is interpreted not to extend the right to counsel to agency contractors during investigations, it would be possible to address the issue either through a statutory amendment or through enactment of appropriate procedural rules by an agency. This section of the report will argue that a right to counsel for agency contractors should recognize the special importance of counsel where an investigation could lead to criminal charges. Where the agency retains the possibility of using the results of an investigation in a criminal proceeding against the interviewee, and relies on contractual provisions to compel the interviewee to appear, the person should have a right to counsel analogous to the right now provided to parties under the APA. As for investigations that will be used for regulatory purposes only, the need for counsel is diminished and will not justify the inconvenience it creates for the investigating agency.

1. Constitutional Analogues

The case for a right to counsel for certain investigations of contractors is not grounded in the Constitution. When an agency is only investigating potential contractor misconduct, there is plainly no constitutional right to counsel.

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[89] 5 USC §§1215(a)(2)(B), 4303(b)(1)(B), 7114(a)(5), 7121(b)(3)(A), 7513(b)(3), 7701(a)(2).
[90] 5 USC §7114(a)(2)(B).

Supreme Court case law, as interpreted by Article III courts and by agency adjudication, clearly establishes that the Sixth Amendment right to counsel does not attach until after the agency has moved beyond the investigative stage.[91]

There may be one limited exception to this observation. Since there is a right to counsel during a custodial interrogation conducted as part of a criminal investigation, there is some reason to believe that a government interview of a contractor regarding misconduct could trigger the right to counsel if it amounted to a custodial interview. This would only occur in an extreme case, where agency investigators physically limit the free movement of the interviewee to such an extent that it resembles an arrest. Courts have been quite reluctant to conclude that any agency interviews of its contractors are custodial, but the Merit Systems Protection Board has been willing to recognize the possibility for some federal employee interview.[92]

While it is true that the Constitution does not give contractors or employees the right to consult with counsel during an investigation, a related line of constitutional cases is nevertheless relevant in establishing the appropriate scope of a right to counsel to be conferred by statute or regulation. The existing APA provision on legal counsel makes the concept of "compulsion" a critical one. A person may be represented by counsel when "compelled" to appear before the agency. If the drafters of the APA were right to say that counsel is most important for persons who are compelled to act by the government, there is a line of constitutional cases that provides some helpful guidance as to which forms of "compulsion" should be a precondition for access to counsel. These cases confirm the commonsense notion that certain threats from the government are just as effective at compelling action as a threat to impose civil or criminal sanctions on a party. The cases arise under the Fifth Amendment's self-incrimination clause.

Agency contractors do not waive all Fifth Amendment rights as a condition of their employment. A threat of dismissal of a contractor who does not answer questions posed by agency investigators qualifies as "compulsion" of testimony under the Fifth Amendment. There is some authority suggesting that an adverse employment action short of dismissal does not work to "compel" testimony.[93]

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[91] Ashford v. Dept. of Justice, 6 M.S.P.R. 458 (1981) (investigation of government employee).

[92] In Chisolm v. United States Postal Service, 7 M.S.P.R. 116, 119-20 (1981), the MSPB decided that where agency investigators conduct an interview that amounts to a "custodial" interrogation, and they anticipate possible criminal charges against the interviewee, they must give Miranda warnings, including the right to counsel. *See also* United States v. Gillyard, 726 F.2d 1426, 1438-29 (9th Cir. 1984); United States v. Steele, 648 F. Supp. 1375 (N.D. Ind. 1986).

[93] *See* United States v. Indorato, 628 F.2d 711 (1st Cir.), cert. denied, 449 U.S. 1016 (1980).

Answers compelled in this way by agency investigators may not be used against the employee in subsequent criminal proceedings.[94]

The Constitution effectively confers on any compelled answers obtained in the workplace a "use immunity."[95] Although employee statements compelled by a threat of dismissal may not be used in later criminal proceedings, statements that demonstrate a violation of workplace rules or expectations can sometimes be the basis for dismissal or discipline.[96] So long as the government does not attempt to use an employee's statement to establish criminal liability, it can use the employee's immunized statements as the basis for adverse job actions. Further, a refusal to answer questions that are specifically, directly and narrowly related to job performance may, consistent with the Constitution, be the basis for dismissal or discipline by the government, even when the answers might incidentally reveal criminal wrongdoing.[97] The courts have reasoned that the government has a legitimate interest in obtaining work-related information from its employees or contractors.[98] This set of Fifth Amendment cases has attempted to balance this interest against the interest of the contractors or public employees in avoiding self-incrimination.

The Fifth Amendment jurisprudence in the government employment and contract context provides some support for a two-track rule governing access to legal counsel. Where the agency compels an employee to answer questions by threatening the employee with discharge, it may not use such compelled statements to establish criminal charges. Criminal charges, however, might still flow from the investigation even though the agency compelled the interviewee to provide information, because the Fifth Amendment requires only use immunity rather than transactional immunity. In such a context, it would seem that the coercive effect of a threat of discharge or contract termination, combined with an intention to prosecute the employee on criminal charges if the investigation yields enough independent evidence, is the equivalent of the "compelled" appearance necessary to invoke a right to counsel under the APA. If the government plans to force cooperation from a person now and hopes to prosecute the same person later on criminal charges, it seems fitting to allow that person to consult with counsel.

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[94] Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Lefkowitz v. Turley, 414 U.S. 70 (1974); Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

[95] Gulden v. McCorkle, 680 F.2d 1070, 1074 (5th Cir. 1982).

[96] Gniotek v. City of Philadelphia, 808 F.2d 241 (3d Cir. 1986), cert. denied, 479 U.S. 984 (1987); D'Acquisto v. Washington, 640 F. Supp. 594, 622 (N.D.Ill. 1986).

[97] Weston v. Department of HUD, 724 F.2d 943 (Fed. Cir. 1983).

[98] A different outcome takes place once a case against a federal employee proceeds to the Merit Systems Protection Board and the employee refuses to testify in those proceedings. Although the employee's silence at that point may be the basis of adverse inferences by the hearing officer, silence in those proceedings cannot be the sole basis for a dismissal. Baxter v. Palmigiano, 425 U.S. 308, 317-19 (1976); Book v. United States Postal Service, 675 F.2d 158 (8th Cir. 1982). A refusal to testify in MSPB proceedings is treated differently from refusal to answer questions propounded by the agency itself, because the former situation does not undermine the agency's ability to monitor employee performance and compliance with the law.

Although the operation of an employee or contractor's right against self-incrimination seems fairly clear, the type of warning that the government must provide an employee under investigation is less certain. For employees covered by the Merit Systems Protections Board, the government employer must warn an employee before an interview that 1) a refusal to answer job-related questions can result in adverse action, and 2) any incriminating answer cannot be used in a later criminal proceeding. Ashford v. Dept. of Justice, 6 MSPR 458, 465 (1981). If the investigators fail to provide the required warnings, any statements obtained cannot form the basis for an adverse job action. Sternberg v. Dept. of Defense, 41 MSPR 46, 53 (1989); Laursen v. Veterans' Administration, 4 MSPR 66 (1980). Article III courts have tended to require less explicit warnings from agency investigators. Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982); Hester v. City of Millidgeville, 777 F.2d 1492 (11th Cir. 1985) (automatic immunity, no explicit offer required); Mack v. United States, 814 F.2d 120, 124 (2d Cir. 1987) (explicit offer needed).

On the other hand, so long as the agency is willing at the outset to forego any use of information in a criminal prosecution, it has more latitude to insist on a statement from its contractors and employees, and to use the answers or the refusal to answer as the basis for non-criminal sanctions. Similarly, the interviewee has a less pressing need for counsel because the sanctions at stake, workplace discipline or contract termination, are not as great as the loss of liberty at stake in the criminal process.

2. Effects on Agency

If federal agencies were to allow consultation with counsel by its contractors when (1) they are "compelled" by threat of discharge to appear at an investigative interview and (2) the investigation could potentially lead to criminal charges against the person, it would not have a debilitating effect on agency investigations. No counsel would be involved where investigators are simply enforcing workplace or contract rules. Employees or contractors would have to obtain their own legal counsel, and many would decline to do so. As for any delays caused by counsel during interviews, the agency could properly promulgate rules limiting the participation of counsel and could exclude those attorneys who obstruct the proceedings. Some federal agencies already allow contractors and employees to consult with counsel during interviews, without serious adverse effects.

There may be some special difficulties in creating a right to counsel for employees, even in the limited circumstances described above. One difficulty arises from the need to treat different groups of employees equitably, and to respect the existing provisions for union representation for those employees subject to collective bargaining agreements. Creating a uniform right to counsel might undermine the value of current workplace benefits secured for some workers by statutes and labor contracts. For that reason, the right to counsel described above should perhaps receive a higher priority for contractors than for employees.

IV. Recommendations for Change

This section will set forth briefly the changes in current law or practice that are outgrowths of the discussion above. Each recommendation is followed by a reference to the portion of the discussion relevant to that issue.

1. When participants in agency investigative proceedings have access to legal counsel, the agency should allow participants' counsel reasonable access to auxiliary professionals or experts, so as to provide fully informed legal advice during the investigative proceedings.

See the discussion at Part II B.

2. When an agency compels a witness to participate in an investigative proceeding (not including routine inspections), it should not seek to exclude the counsel of the witness, or insist that the witness choose different counsel, unless it has concrete evidence that the presence of the witness' counsel is likely to materially impede the investigation. For example, the agency might have evidence that the witness involved may not fully or truthfully answer an investigator's questions if the attorney continues to represent the client. Such evidence should wherever possible be based on statements of the witness rather than speculation regarding the incentives of the witness or the attorney. Similarly, the agency might have evidence that truthful testimony by the witness will incriminate another client of the attorney. The mere fact of multiple representation, an employment relationship between the witness and some other party involved in the investigation, or past dealings between the agency and a particular attorney are not, in and of themselves, a sufficient basis for excluding the counsel of a witness.[99]

See the discussion at Parts II A & C.

3. Whenever a person has a right to counsel under the APA (5 USC § 555(b)) or otherwise, the agency should inform the person of his or her right to counsel.

See the discussion at Part II D.

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[99] This recommendation does not, however, address the authority of an agency to exclude counsel from investigative interviews because of disruptive or obstructionist conduct. It also does not address situations where the attorney is suspected of personal involvement in criminal activity under investigation.

4. If the nature of an agency's investigation makes it likely that criminal charges could result, the agency should inform the person being interviewed of that fact. If, in the course of the investigation, it becomes apparent to senior agency officials that a particular person is likely to be referred for or otherwise become subject to criminal charges, the agency should inform the person of that fact before making further efforts to gather information from the person. The agency should withhold this notice only when it is legally obliged to do so. Agencies should train their personnel concerning their responsibilities with respect to the rights of witnesses.

See the discussion at Part II E.

5. Where agency investigators rely on contractual provisions to induce the cooperation of an interviewee who is the agent of a contractor, they should allow counsel to participate in any interview they believe could produce evidence that could be used in a criminal prosecution.

See the discussion at Part III B.

Report

Organization of Adjudicative Offices in Executive Departments and Agencies

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This report was prepared for the consideration of the Administrative Conference of the United States. It is included in this volume at the direction of the Committee on Adjudication. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

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I. Introduction

This study analyzes the adjudicative structures used in various federal executive branch agencies.[1] Those structures have changed dramatically during this century.[2] At the beginning of the century, most adjudications were presided over by so-called "examiners," a term that came into use in 1906.[3] Agencies appointed their own examiners, and maintained control over their assignment, compensation, promotion and retention.[4] Early examiners had a status comparable to that of an "underling or subordinate,"[5] and often served at the pleasure of their superiors.[6] Because examiners lacked job security,[7] many questioned whether examiners could decide cases fairly and impartially.[8]

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[1] Agencies have performed adjudicative functions since the eighteenth century. 3 Kenneth Culp Davis, Administrative Law Treatise, §17.11 at 313 (2d Ed. 1980):

> The first administrative hearing officers of the federal government may have been the officers who in 1789 determined what soldiers were "disabled during the late war," or may have been the customs officers who in 1789 were authorized to "estimate the duties payable" on imports. Then came inspectors of hulls and boilers of vessels, who started deciding cases in 1838, and registers of the General Land Office, who began in 1840.

See also Louis G. Caldwell, *A Federal Administrative Court*, 84 PA. L. REV. 966, 970 (1936)("[U]nder a bewildering medley of federal statutes, judicial functions galore have been lodged in the President, in agencies directly responsible to the President, in the heads of government departments, in subordinate officials and bureaus in those departments, and in the so-called independent boards and commissions....").

[2] As early as 1936, there were "about seventy-three administrative tribunals in the federal government performing judicial functions in about 267 classes of cases." Caldwell, *supra* note 1, at 970.

[3] *Id.* The first officers to have the title of "examiners" were probably appointed in the ICC pursuant to the Act of 1906, which authorized employment of "special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence." 34 Stat. 595 (1906). For nearly twenty years, the Commissioners had somehow managed to hear cases themselves, but the volume of business grew too heavy. Eight "special examiners" were listed among the ICC employees in the 1907 annual report. When Congress in 1914 created the Federal Trade Commission, it provided that the Commission "shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties...." 38 Stat. 718 (1914). The Shipping Act was the first to copy this provision, which soon became the prototype for the many regulatory agencies. 39 Stat. 729 (1916).

[4] *Id.*: The statutes did not create the office of examiner; they authorized the agencies to do so. The statutes spoke of examiners along with "clerks ... and other employees."

[5] *Id.* Because agencies retained such broad powers, "no power was withdrawn from any agency when the agency appointed examiners and assigned them duties. The examiners were in all respects subordinate, in no respect independent." *Id.*; *see also* Malcolm Rich, *Adapting the Central Panel System: A Study of Seven States*, 65 JUDICATURE 246 (1981)(The agencies controlled the compensation and job tenure of their hearing officers and could ignore their decisions and enter de novo rulings instead.).

[6] Caldwell, *supra* note 1, at 546: Where the administrative tribunal is part of an executive department, or is directly responsible to the President (and, indeed, created by him), there seems to be no doubt about the power of removal, even without cause, and the administrative judge holds his office and his means of livelihood at the pleasure of his superiors. The only administrative judges that may be said to have a reasonably secure tenure of office are the members of certain of the so-called legislative courts, e.g.,

During the 1930s, other questions were raised about the hearing process.[9] In a 1934 report, the American Bar Association's (ABA) Special Committee on Administrative Law criticized the fact that some adjudicators exercised both prosecutorial and adjudicative functions.[10] Moreover, even had examiners been

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the Court of Claims and the Court of Customs and Patent Appeals; even they have had the security of their tenure weakened by decisions of the Supreme Court.

[7] *See* Rich, *supra* note 5.

[8] An ABA Report concluded that:

> [A]ppointments to administrative tribunals are all too generally classed as patronage and, it is to be feared, the decisions of some of them are occasionally dealt with as a form of patronage. It is not easy to maintain judicial independence or high standards of judicial conduct when a political sword of Damocles continually threatens the judge's source of livelihood. While a few federal administrative tribunals have, in spite of all obstacles, preserved a high degree of independence from political pressure and political considerations, unfortunately there are others which have yielded and as a result the cause of justice has suffered.

Caldwell, *supra* note 1, at 546; *see also* Jeffrey S. Lubbers, *Federal Administrative Law Judges*, 33 ADMIN. L. REV. 109, 111 (1981).

[9] *See* Caldwell, *supra* note 1, at 973:

> If there is anything of which we can be relatively sure after some hundreds, even thousands, of years of experience with judicial machinery, it is that no man can be trusted to be judge in his own case. And he is a judge in his own case if he is also the prosecutor or if he is also the legislator who made the rule he is asked to interpret and apply. Agency after agency in our federal government is authorized to wield all three powers of government at once. Wearing its legislative toga, a commission makes a regulation, on compliance with John Doe's right to continue in business may depend. Having reason to believe that John Doe is guilty of violating the regulation, the commission doffs the toga and, taking up the executive scepter, investigates and prosecutes him. With the scepter still in its hand, the commission hurriedly dons the judicial ermine and proceeds to present itself at least two scintillas of evidence to prove that it was right in the first place. While care is sometimes taken to preserve the form of placing the burden of proof on the prosecutor, all the form in the world cannot disguise the fact that the burden is usually on John Doe to prove himself innocent before a commission that at least strongly suspects he is guilty. If John or his lawyer construes the regulation differently than does the commission, that is just unfortunate for John. The commission made the regulation and is confident that it knows what it meant to say. And it is always free to change its mind. John is in the position of a man whose wife changes her system of bidding in the middle of a bridge game without notice. He is sure to lose and equally sure to get blamed for it.

Those who made these claims may have been concerned, quite simply, about the degree of power being assumed by federal agencies. Mr. Chief Justice Charles Evan Hughes stated that:

> The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say "let me find the facts for the people of my country, and I care little who lays down the general principles.

U.S. Daily, Nov. 1, 1930, at 1.

[10] Report of the ABA's Special Committee on Administrative Law, 59 ABA Rep. 539, 545-46; *see also* Caldwell, *supra* note 1, at 975.

functionally separate, their decisions were not final. Agency superiors were free to override those decisions.[11]

By the 1940s, these criticisms led to passage of the Administrative Procedure Act (APA).[12] The APA created the position of Administrative Law Judge (ALJ) (initially, the APA referred to ALJs as "hearing examiners"),[13] and gave ALJs protections designed to ensure their independence.[14] In addition, the APA gave ALJs an important role in the adjudicative process. At formal hearings, an agency could hear a case itself, or could have the case heard by one or more members of the body comprising the agency. Unless an agency chose one of those two options, the APA required the agency to have one or more ALJs appointed under §3105 of the Act preside at the taking of evidence.[15] The APA also imposed strict divisions between those who prosecute and those who adjudicate.[16]

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[11] *See* Lubbers, *supra* note 8, at 111 ("Furthermore, the role of the presiding officer in an agency's decisional process was often unclear; many agencies would ignore the officer's decisions without giving reasons, and enter their own de novo decisions.").

[12] Section 554 of the APA applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 USC §554(a)(1988).

[13] Marvin Morse, *The Administrative Law Judge: A New Direction for the Corps?*, 30 FED. B. NEWS & J. 398, 401 n.2 (1983)(The APA...initially referred to presiding officers as examiners, colloquially referred to as hearing examiners. The title was administratively standardized to Administrative Law Judge by the Civil Service Commission in August 1972. The ALJ title was ratified by the Act of March 27, 1978, Pub. Law 95-251, 92 Stat. 183); *See* Paul Verkuil, Daniel Gifford, Charles Koch, Richard Pierce & Jeffrey Lubbers, *The Federal Administrative Judiciary* 13 (1992) (hereafter 1992 ALJ Study).

[14] *See also* Rich, *supra* note 5, at 246. The Congress, in its 1946 Administrative Procedure Act (APA) sought to establish a corps of federal hearing officers that were more independent of the agencies. Hearing officers were to be given career appointments and compensation was to be managed by the Office of Personnel Management. Yet the hearing officers were not granted complete independence from the agencies, for the APA allowed them to be assigned exclusively to particular agencies. ALJs are certified by the Office of Personnel Management (OPM). ALJs do not go through a probationary period.

OPM "is exclusively responsible for the initial examination, certification for selection, and compensation of ALJs. OPM determines the minimum experience needed to be an ALJ, it conducts interviews, administers a test of writing ability, evaluates the experience of applicants and ranks eligible applicants...." ALJs are selected from the register by the agencies themselves. *See* Lubbers, *supra* note 8, at 267.

ALJs receive a measure of job security. They are not given life tenure, but they can be removed only for cause or due to a reduction in force. 5 USC §7521 (1988), 5 CFR §1201.131 (1980). In addition, the APA requires that ALJs be assigned their cases in rotation, and that ALJs not perform duties inconsistent with their role as ALJs. ALJ compensation is based on length of service rather than on performance evaluations. The APA also provides that ALJs not be responsible to, or subject to supervision by, anyone performing investigative or prosecutorial functions for an agency. 5 USC §554(d)(1988).

[15] 5 USC §556(b)(1988). Examiners were required to render an initial decision in any case in which they presided. 5 USC §557(b)(1988)("... unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision."). In addition, the examiner's decision became the agency's final decision unless it was reviewed by the agency. *Id.* If the agency decided to review, it retained broad authority to substitute its judgment for that of the presiding employee. *Id.*

Even though the APA altered the adjudicative process in many respects, that Act left many existing processes intact. The APA did not create an independent administrative judiciary comparable to that used in the federal court system. During the 1930s, many called for the creation of a federal administrative court that would hear administrative cases.[17] But Congress rejected this idea, opting instead to leave ALJs in the agencies for which they adjudicate,[18] and to have ALJs report to non-ALJs in those agencies. In doing so, Congress created the paradox of independent adjudicators in a situation where questions might be raised about their independence.

This paradox was further compounded by the fact that Congress limited the effect of ALJ decisions. ALJ decisions could become final agency decisions if they were not reviewed and overturned, but ALJ decisions were reviewable. Thus, even though the APA established independent trial-level adjudicators, it allowed the decisions of those adjudicators to be reviewed by non-independent adjudicators.

Today, agencies vary considerably regarding how they structure their adjudicative offices. They vary, first, in regard to their administrative structures. Some agencies allow ALJs to manage themselves through a chief ALJ system. This is true at the Department of Transportation. Other agencies assert more supervisory control over their ALJ offices (although not over the ALJs' decisionmaking processes) through a director, a chief administrative hearing officer (CAHO), or a judicial officer (JO). The Interior Department and the Justice Department's Executive Office of Immigration Review (EOIR) have a Director and a CAHO, respectively, while the United States Postal Service (USPS) has a JO.

Agencies also vary regarding their review of ALJ decisions. At some agencies, the agency head retains the right to personally review ALJ decisions. At other agencies, the agency head has delegated review authority to a review board or some subordinate official. Some of these review bodies or subordinates have protections designed to ensure their independence while most do not. In a few instances, Congress has stripped agencies of their review authority, and has vested that authority in some other agency.[19]

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[17] *See* John O'Reilly, Jr., *The Federal Administrative Court Proposal: An Examination of General Principles*, 6 FORDHAM L. REV. 365 (1937); *see also* Attorney General's Committee on Administrative Procedure - Majority and Minority Reports, 27 A.B.A.J. 91, 93 (1941).

[18] *See* Rich, *supra* note 5, at 246 ("Yet the hearing officers were not granted complete independence from the agencies, for the APA allowed them to be assigned exclusively to particular agencies.").

[19] Congress divided responsibility for the Occupational Safety and Health Act between the Secretary of Labor and the Occupational Safety and Health Review Commission (OSHRC). 29 USC §§651-678 (1988). The Secretary was given responsibility for promulgating and enforcing regulations, 29 USC §665, 658, 659 & 666 (1988), while OSHRC was given adjudicative authority. 29 USC §651(b)(3) (1988).

This study examines how agencies organize their adjudicative structures. Particular attention is given to how ALJ offices are supervised and administered, as well as to how agencies structure their appellate processes. In addition, the study analyzes how agencies use decision writers at the trial level.

II. The ALJ Offices Studied

The study focuses on eleven agencies. Seven of these agencies use the chief ALJ system, and four have non-ALJ administrative systems. Some of these latter agencies have chief ALJs who share administrative responsibilities with the non-ALJ, but who have fewer responsibilities than chief ALJs in the other agencies studied.

The study was based, primarily, on direct interviews with ALJs, chief ALJs, non-ALJ administrators and others in the affected agencies.[20] Listed below is a short description of each of the ALJ offices studied.

A. Chief ALJ Systems

Agencies that use the chief ALJ system include the following agencies.

1. Social Security Administration

SSA's Office of Hearings and Appeals (OHA) has the largest and most complicated ALJ organizational structure.[21] OHA has approximately 850 ALJs and an equal number of decision writers (staff attorneys and paralegal specialists). The ALJs and decision writers are scattered throughout the United States in regional and local hearing offices. SSA's Chief ALJ reports to SSA's Associate Commissioner for Hearings and Appeals.

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[20] At agencies that use the non-ALJ management system, most of the affected ALJs were individually interviewed. The NRC and USPS had only one ALJ at the time of the interviews, and both of them were interviewed. DOI has four ALJs who handle land cases, and three of them were interviewed. Several of DOI's ALJs who probate estates were also interviewed. EOIR had four ALJs at the time, and three of them were interviewed.

A number of ALJs who serve under chief ALJs were also interviewed. Because SSA has so many ALJs, many of the ALJs were from that agency. The author had extensive discussions with 25 ALJs, and more limited discussions with another 15-20 ALJs, all of whom serve under chief ALJs. Of DOT's four ALJs, the author had extensive discussions with three of them.

[21] Cases come to OHA via state agencies who initially decide whether benefits should be granted or withheld. If the agency denies benefits, and if a request for reconsideration is denied, the claimant may request a hearing by an SSA ALJ. The ALJ exercises *de novo* jurisdiction.

2. Department of Transportation Office of Hearings

The Department of Transportation's Office of Hearings[22] is tiny compared to SSA's massive structure. The Office has four ALJs, all of whom are based in Washington, D.C., as well as an Administrative Officer,[23] four attorney-advisers (staff attorneys), a Transportation Industry Analyst,[24] and four clerical workers. The office is managed by a Chief ALJ who reports to DOT's Assistant Secretary for Administration.[25]

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[22] DOT has two sets of ALJs: those in the Office of Hearings and those who handle Coast Guard cases. The Office of Hearing's ALJs were formed from a nucleus transferred from the CAB when that board was abolished.

[23] The Administrative Officer also serves as the office manager. She describes her job as follows:

> The major responsibilities of the Administrative Officer...are: (1) Budget (developing budget requirements; maintaining appropriate records;...maintaining fund controls; making recommendations on distribution of funds); (2) Personnel Management (providing information to management relative to personnel policy and procedures; interviewing clerical applicants; developing position descriptions and performance standards; developing tracking plans); (3) Administrative Support (management of space, property, and various resources); serves as security coordinator and representative; prepares procurement requests and serves as the Contracting Officer's Technical Representative in acquiring court reporting services; (4) LAN Systems Manager (managing the case tracking system and developing changes and forms as necessary to accommodate the automated office needs; upgrading equipment and programs); (5) Reimbursable Agreements Project Manager (tracking office staff hours by modal administration; projecting costs based on anticipated caseload and preparing reimbursable agreements and billings); (6) Internal Control Representative (establishing, maintaining, and reviewing internal control systems and conducting yearly vulnerability studies).

Fax from Peggy Spina, Administrative Officer at 2 (Jan. 26, 1993)(on file with author) (hereinafter *Spina Fax*).

[24] The Transportation Industry Analyst is charged with a number of duties. He assists ALJs in analyzing economic and statistical issues in applications, information responses and exhibits filed in cases set for hearing; reviews materials to assess compliance with reporting requirements and information requests; assists in preparing economic and financial elements in initial or recommended decisions; prepares tables and charts supporting and supplementing ALJ decisions; attends prehearing conferences and hearings and assists the judges in matters related thereto. *Id.*

[25] DOT's ALJs decide cases for a number of different administrations within DOT including the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), the National Highway Transportation Safety Administration (NHTSA), the Maritime Administration (MARAD), and the Research and Special Programs Administration (RSPA). They also decide some cases for the Office of the Secretary.

The Office of Hearings' relationship to these other administrations can be described as follows:

> The Office of Hearings operates on a reimbursable agreement basis with the modal administrations. Quarterly billings are made which cover the costs of personnel compensation and benefits, automated data processing, communications, and contractual costs for court reporting services. Each modal administrative issues travel orders and directly reimburses the Judges for travel costs incurred in holding proceedings. Costs incurred for holding proceedings for the Office of the Secretary are absorbed directly by the Office of the Assistant Secretary for Administration.

Spina Fax, *supra* note 23, at 2.

3. Environmental Protection Agency

The Environmental Protection Agency's (EPA) ALJ office is also relatively small. It has a total of seven ALJs, all of whom are based in Washington, D.C. The ALJs are supported by two staff attorneys and seven legal staff assistants. The Chief ALJ has an administrative assistant who relieves the ALJ of budgetary, procurement, personnel and housekeeping details. EPA also has a judicial officer in each region who handles non-APA adjudications.

The ALJ office is attached to the Office of the Administrator, and in theory reports directly to the Administrator. In reality, the Chief ALJ works with the Administrator's Chief of Staff, who handles day-to-day managerial and administrative matters. The office's budget is developed as part of EPA's regular budget process.

4. Department of Agriculture

The United States Department of Agriculture (USDA) has five ALJs located in Washington, D.C. The ALJ office also has a hearing clerk, who functions like an administrative assistant, and two law clerks. The Chief ALJ reports to USDA's Assistant Secretary for Administration.

5. Department of Commerce

The Commerce Department has only one ALJ, who handles National Oceanic and Atmospheric Administration (NOAA) cases,[26] as well as some cases for the Bureau of Export Administration (BXA), and the Patent Office. The ALJ reports to the Assistant Secretary for Administration on matters relating to travel orders, budget, personnel support, and supplies. The office includes the ALJ, a staff attorney,[27] a docket clerk,[28] an office manager[29] and a secretary.[30] In addition to his adjudicative responsibilities, Commerce's Chief ALJ serves as the office manager overseeing the staff attorney and the other support staff.[31]

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[26] 15 CFR §904 (1993). In September, 1992, Commerce obtained an ALJ on loan from the NLRB. Initially, the borrowed ALJ was allowed to hear all Commerce cases, but he is now excluded from NOAA cases arising under the Lacey Act.

[27] Until recently, the office had an AJ. However, the AJ was riffed.

[28] At present, the docket position (a single FTE) is split between two law students. They serve at the GS-7 level.

[29] The office manager is a GS-8.

[30] The secretary is a GS-6.

[31] One of his duties is to review the performance of staff personnel. Commerce's ALJ office has a relatively sophisticated computerized case tracking system.

6. Department of Labor

The Department of Labor (DOL) has about 80 ALJs. Most of the ALJs are located in Washington, D.C. The remainder (30) are located in district offices that contain anywhere from four to ten judges. These offices are located in San Francisco, New Orleans, Fort Lauderdale, Hampton, VA, Camden, NJ, Boston, MA, Pittsburgh, and Cincinnati.

7. Federal Communications Commission

The Federal Communications Commission (FCC) has nine ALJs including the Chief ALJ. All are located in Washington, D.C. The Chief ALJ reports, for administrative purposes, to FCC's Managing Director. The ALJs are supported by nine legal technicians who perform secretarial and quasi-paralegal functions, and an administrative officer who handles personnel matters, records and statistics.

B. Non-ALJ Director Systems

The four agencies that use the non-ALJ system vary considerably. At all of the agencies, the non-ALJ supervises the ALJ office from an administrative perspective. At a few of the agencies, the non-ALJ is also involved in the agency's review process.

1. Executive Office of Immigration Review

The Justice Department's Executive Office of Immigration Review (EOIR) has four ALJs.[32] Two are based in Washington, D.C., and two are based in San Diego. All four work under EOIR's Chief Administrative Hearing Officer (CAHO), who is a lawyer rather than an ALJ. The office does not include any AJs, but does include a support staff of law clerks and secretaries.

The CAHO reports for administrative purposes, but not for adjudicative purposes, to the Director of EOIR. The CAHO is subject to performance appraisals by the Director.

2. Department of the Interior

The United States Department of the Interior's (DOI) Office of Hearings and Appeals (OHA)[33] is staffed by 12 ALJs, eight of whom handle Indian Probate cases.[34] At one time, all ALJs were attached to the Bureau of Land Management (BLM). In addition, until recently, DOI's ALJs were managed by DOI's Chief ALJ. However, in 1991, the Chief ALJ was riffed during a reorganization. At that point, OHA's Deputy Director assumed administrative responsibility over the ALJ offices.[35] The Director reports to the Assistant Secretary for Policy, Management and Budget.[36]

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[32] The ALJs handle employer sanctions and immigration related unfair employment practices cases. In addition, they recently received jurisdiction over a new class of cases: Immigration Act of 1990 document fraud civil penalty cases (e.g., employers who hire illegal immigrants based on phony identification of which the employer is aware).

[33] 43 CFR §4.1 (1992).

The ALJs themselves are based in different places. Those who handle land cases are based in Salt Lake City (three ALJs) and Knoxville (TN) (one ALJ who handles primarily surface mining cases). Those who handle primarily Indian Probate work are based in Sacramento (CA), Phoenix (AZ), Billings (MT), Albuquerque (NM), Oklahoma City (OK), Rapid City (SD), and Minneapolis (MN) (two positions).

Each office has some support staff, but the level of support varies. The Salt Lake City office had two temporary law clerks at the date of the interview and three secretarial/clerical assistants. One of the clericals is a legal assistant who handles case docketing. The ALJs who probate estates are each supported by a paralegal and a clerical legal assistant. The paralegal prepares draft decisions for the ALJs.

3. United States Postal Service

The United States Postal Service (USPS) has only a single ALJ (a second position is authorized but vacant),[37] no staff attorneys or law clerks, and one secretary (which it shares with USPS' Board of Contract Appeals). At the moment, the sole ALJ carries the title "Acting Chief ALJ." The ALJ office is located in Washington, D.C. and reports to USPS' (Judicial Officer) JO.

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[34] Other ALJs handle land cases. Those who handle Indian Probate matters must resolve a variety of probate issues including determination of an Indian's heirs, consideration of the validity of marriages and divorce decrees, resolution of paternity issues, and assessment of the impact of common-law living arrangements. In resolving these issues, the ALJs must take into account decrees rendered by tribal courts, state courts and federal courts, and must consider how those decrees affect a family's structure in terms of divorces, marriages, adoptions, etc. The ALJs also make nationality determinations. Indians are allowed to travel freely back and forth between Canada and the U.S., but their nationality determines whether the government can hold property in trust for them. ALJs also rule on creditors' claims. ALJs cannot sell trust land to pay the claims, but they can use the income from the lands for that purpose.

[35] 43 CFR §4.1(a) (1992).

[36] 43 CFR §4.1 (1992):

> The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary....

[37] ALJs hear a variety of cases including those involving false representation, withheld mail, mailability, second class mail privileges, termination of post office box privileges, program fraud civil remedies cases. In addition, they have concurrent jurisdiction with USPS' AJs over Board of Contract Appeals Cases, Debt Collection cases, certain mail disputes, and administrative offsets. *See* 39 CFR §952-66 (1992).

USPS' ALJ office is a bit unique in that, even though the office has a Chief ALJ, the office is administered by USPS' JO.[38] The JO is an AJ who, by regulation, is quasi-independent. The JO functions a bit like EOIR's CAHO in that, not only does he have direct responsibility for the functioning of the ALJ office, he also hears appeals from ALJ decisions[39] and serves as Chairman of USPS' Board of Contract Appeals (BCA).[40] The JO takes an active interest in the office's administration and functioning.

4. Nuclear Regulatory Commission

One agency, the Nuclear Regulatory Commission (NRC), has an ALJ on its Atomic Safety and Licensing Board Panel. This Panel, which is headed by a Chief AJ,[41] is a bit different than the other offices studied. It is a 43-person panel composed of 16 permanent judges based in Washington, D.C. and 23 part-time judges scattered around the country.[42] The panel includes one ALJ,[43] 11 administrative judges (AJs), and technical people such as engineers (nine), physicists (six), environmental and public health scientists (nine), medical doctors (three), and a geoscientist.[44] The part-time judges are hired as special government employees on a contractual basis.

The Panel usually sits in three-person boards consisting of a lawyer and two technically trained people.[45] The boards are chaired by the lawyer member, who controls the hearing from a procedural perspective.[46] Under the Atomic Energy

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[38] Under USPS regulations, the JO is charged with "[a]dministratively supervising Administrative Law Judges and hearing appeals from their decisions." 39 CFR §226.2(e)(1)(vi) (1992).

[39] *Id.*

[40] 39 CFR §955.1(b)(2) (1992) & 39 CFR §226.2(e)(1)(v) (1992).

[41] The Panel handles initial licensing cases (both construction and operating licenses), licensing amendment cases (reactor licensing - utilization facilities), enforcement cases, and materials licensing cases. Materials licensing cases include a wide spectrum of uses including doctors that have radiology equipment (and who must have materials licenses from the NRC). The NRC also handles a spectrum of other matters including cases relating to the mining and milling of uranium, facilities that fabricate fuel for reactors, radiation sterilization facilities, radiographers, etc. The office also handles a hodge podge of other cases under various amendments to the Atomic Energy Act. 42 USC §2011, *et seq.* (1988).

[42] There are a few instances, primarily involving import-export issues, when the Commission acts as the trial level adjudicator. These cases are handled under special rules, and involve informal paper type adjudications.

[43] The Atomic Energy Commission (AEC) used single hearing examiners in Atomic Energy Act cases until about 1962. The Act was amended in that year to provide for the use of three member boards combining legally and technically qualified members.

[44] The geoscientist is a seismologist.

[45] In some instances, a single AJ hears a case alone. Generally, this is done only in materials or operator licensing cases. *See* 10 CFR §2.1201(a) (1992).

[46] However, when cases involve antitrust issues, the panels that hear these cases are sometimes made up exclusively of lawyers.

Act, as well as under other acts, some matters must be heard by an ALJ as opposed to just a licensing board (these cases are limited to Program Fraud Civil Remedies Act cases). The AJs are treated like ALJs in that they are not subject to performance reviews.

III. A Comparison of Chief ALJ and Non-ALJ Administrative Systems

How do the chief ALJ and non-ALJ systems differ? Almost every agency has some sort of ALJ management. But, in those agencies that use the non-ALJ system, non-ALJs handle more of the day-to-day administrative matters.

This section examines how the two administrative systems differ. It begins by analyzing chief ALJ systems in an effort to detail the functions performed by chief ALJs. Then, it analyzes non-ALJ administrative systems in an effort to see how those matters handled by chief ALJs are distributed under non-ALJ systems.

A. Examples of Chief ALJ Managerial Systems

Chief ALJ systems vary from agency to agency. In this section, the systems used at three different agencies are analyzed. DOT's Chief ALJ system is offered as a typical ALJ system. SSA and DOL are also examined because they involve large and complex ALJ management systems.

1. Transportation: A Typical System

DOT provides a good example of a chief ALJ system. DOT's Chief ALJ is charged with "providing the administrative guidance and leadership necessary to ensure thorough and expeditious processing of all formal hearing proceedings arising before the office."[47] This charge requires him to perform the following functions:

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[47] Position Description, Chief Administrative Law Judge, DOT. The document further describes the Chief ALJ position as follows:

> The Chief Administrative Law Judge, with regard to the responsibilities described in Part II above, provides general administrative direction for the Administrative Law Judges assigned to the Office of Hearings and provides general administrative direction for the Administrative Law Judges assigned to the Office of Hearings and provides supervision for the necessary support staff, including attorney-advisers, industry analysts and clerical personnel.
>
> Execution of the Chief Administrative Law Judge's responsibilities requires a continuous review of the status of all pending cases. It also requires a great deal of tact. Cases must be processed expeditiously, while still recognizing the individual judge's independence and responsibility to conduct administrative hearing proceedings in an impartial and objective manner. Cases instituted for formal hearings typically involve

1. Maintaining (1) a calendar of cases assigned to the Office of Hearings proceedings, (2) a control system to monitor the status of those cases, and (3) periodic statistical reports on the proceedings of those cases.

2. Assigning cases, in rotation to the extent practicable, to individual Administrative Law Judges assigned to the Office.

3. Ensuring that hearing proceedings conducted by the Office are in accord with procedural requirements of the Administrative Procedure Act and the applicable agency Rules of Practice.

4. Monitoring, in consultation with other Administrative Law Judges in the Office, the status of pending cases and recommending reasonable standards of quality, output and general performance to ensure the timely and expeditious processing of those cases.

5. Ensuring that individual Administrative Law Judges assigned to the Office have available to them copies of statutes, regulations, agency policy statements and agency Rules of Practice which they are required to apply in the conduct of their hearing proceedings. Also, ensuring that these judges are provided periodic training concerning relevant legislation, regulations, policy statements, Rules of Practice, changes therein and their impact on the hearing process.

6. Supervising and evaluating performance, in accord with government-wide and agency regulations and procedures, of such professional, technical and clerical staff as are needed in the Office to support the Administrative Law Judges in the conduct of their hearing proceedings.

7. Recommending the resources and fiscal requirements necessary to accomplish the work of the Office, and justifying such recommendations to the Assistant Secretary for Administration.

8. Carrying out applicable administrative management regulations and procedures governing assignment of office space, approval of leave, and approval of travel vouchers and itineraries for all employees assigned to the Office.

> complex and conflicting legal questions or factual issues that are not susceptible of resolution through purely administrative or routine procedures. Individual cases may involve important questions of public policy, have substantial impact on activities of the agency and the major interest groups involved, may be of critical concern to the public interest, and may be of national or international import. Parties to all cases must enjoy full assurance that hearings are conducted in an impartial manner.
>
> The Chief Administrative Law Judge's role as an Administrative Law Judge responsible for conducting administrative proceedings is functionally comparable to that of a judge of a court of record, with unusual latitude for the exercise of discretion and independent judgment in the conduct of the proceedings and the determination of all issues of law and fact.

Id.

9. Carrying out applicable personnel management regulations and procedures governing responsibilities such as staffing, employment, retention, training, disciplinary actions, labor management relations and equal employment opportunity for all employees assigned to the Office.

10. Initiating investigations into allegations of improper conduct on the part of any employee of the Office of Hearings, including Administrative Law Judges of the Office who may be in violation of the law, regulations and agency operating regulations and procedures.

11. Serving as liaison between the Office, other offices in the Department, other government offices, and professional bar associations to promote better understanding of and improvement in the hearing process.

12. Performing special studies and other administrative duties as may be assigned that are not inconsistent with the responsibilities of an Administrative Law Judge under the provisions of the Administrative Procedure Act.[48]

DOT's Chief ALJ is also authorized to "personally preside at hearings in some of the more difficult and controversial proceedings that come before the office."[49]

2. SSA: Chief ALJs in a Large Bureaucratic Structure

SSA provides a good example of how the chief ALJ system functions in an agency with a large number of ALJs. SSA's ALJs serve under SSA's Chief Administrative Law Judge (Chief ALJ), who reports to SSA's Associate Commissioner for Hearings and Appeals, and who has administrative responsibility for SSA's regional and local offices. Historically, SSA's Chief ALJs have devoted themselves entirely to administration and have carried no caseload. The current Acting Chief ALJ departs from this mold. Although he devotes more than 95% of his time to administration, he still hears some cases.[50]

The Chief ALJ supervises a massive bureaucracy that includes ten regional offices and 132 local offices.[51] At each level, SSA's ALJ offices are headed by

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[48] *Id.*

[49] *Id.* USDA's system is similar. By regulation, USDA's Chief ALJ has the following powers:

(b) The Chief Administrative Law Judge is delegated the following administrative responsibilities subject to the guidance and control of the Assistant Secretary for Administration (*See* §2.25(a)):

(1) Exercise general responsibility and authority for all matters related to the administrative activities of the Office of Administrative Law Judges.

(2) Direct the functions of the Hearing Clerk as set out in §2.25(a)(3).

7 CFR 2.41(b). The FCC's Chief ALJ's powers are described in 47 CFR §0.351 (1992).

[50] He does so because he wants to gain a better sense of how new regulations are being implemented, as well as because he wants to maintain closer contact with hearing office ALJs so that he can be more aware of their needs and concerns.

[51] Regional offices are located in Boston (Region I), New York (Region II), Philadelphia (Region III), Atlanta (Region IV), Chicago (Region V), Dallas (Region VI), Kansas City (Region VII), Denver (Region VIII), San Francisco (Region IX), and Seattle (Region X).

Hearing Office Chief ALJs (HOCALJs). Regional Chief ALJs (RCALJs) supervise the regional offices and have responsibility for the hearing offices in their regions. RCALJs split their time between administration and adjudication, generally spending most of their time (75%) on administration and some time (25%) on hearing cases. But the situation varies somewhat from region to region, and some RCALJs hear no cases.[52]

RCALJs also have general administrative responsibility over the hearing offices in their regions. Their authority extends to budgeting, hiring, allocation of support personnel, overtime, employee performance awards and other administrative matters. While RCALJs are not responsible for evaluating the performance of clericals and staff attorneys in hearing offices, they do review the evaluations of hearing office managers and supervisory staff attorneys. RCALJs also manage their own regional offices and make day-to-day administrative decisions (e.g., relating to equipment, supplies, office space), and handle fee petitions by attorneys (they delegate this task to subordinates).

HOCALJs manage SSA local offices. Although HOCALJs carry a substantial caseload, they generally spend a significant amount of time on administration. Some HOCALJs spend more time on administration than others, depending on the needs of the office and their own inclinations.

HOCALJs perform a variety of functions. In general, they manage SSA hearing offices on a day-to-day basis. They assign cases to ALJs, and they supervise and assign the non-ALJ staff, including secretaries, staff attorney decision writers, and paralegal specialists (nonattorney decision writers). HOCALJs have ultimate responsibility for reviewing the performance of most non-ALJ subordinates, and they also make recommendations regarding awards and promotions. Finally, HOCALJs make decisions about office space allocation, as well as about travel, professional development, and spending priorities (e.g., should the office buy a new chair or desk?), and they deal with complaints and other office problems including caseload management problems (e.g., if an ALJ requests maternity leave). HOCALJs have a very limited role in the budgetary process which is within the purview of the Chief ALJ and the RCALJs.[53]

SSA's RCALJs and HOCALJs are supported by a large administrative structure. At the regional level, there is a Regional Management Officer (RMO), a Manager of the Field Liaison Staff, a Manager of the Administrative Section (who handles budgeting and employment matters), and a Regional Attorney (who manages the staff attorneys who handle attorney fee petitions). In one regional office, there is also a Deputy RMO. The Manager of Field Liaison Staff oversees a contingent of Field Liaison Officers (FLO). Usually, SSA has one FLO per state who is charged with handling interactions between the regional office and the hearing offices in their states.

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[52] One RCALJ stated that he has not heard any cases in the last six or seven months due to his burgeoning administrative responsibilities and due to limited staff resources in the hearing offices. This RCALJ felt that, if he did hear cases, he would be using resources that are needed by hearing office ALJs.

[53] HOCALJs are not required even to submit proposed budget. Most of the budget remains constant (including amounts spent for rent and salaries), and are automatically budgeted from year to year. Each HOCALJ is given some discretionary money which is generally used for training and travel.

HOCALJs are supported by a Hearing Office Manager (HOM) and a Supervisory Staff Attorney. They are also supported by other personnel (e.g., Lead Hearing Assistant, Lead Hearing Clerk, Management Assistant), but offices vary somewhat in terms of their support personnel. HOMs and Supervisory Staff Attorneys relieve HOCALJs of many management responsibilities. The HOM oversees the clerical staff, evaluates contractor's invoices, orders supplies and handles other administrative matters. HOMs are rated by the Chief ALJ, but this rating is subject to approval in the regional office (as is the Supervisory Staff Attorney's rating). Even though HOMs are subordinate to the chief ALJs in their offices, they work extensively with the RMOs and other regional support personnel. Hearing office Supervisory Staff Attorneys report to their HOCALJs, and manage the staff attorney decision writers as well as the paralegals.

3. DOL

DOL provides a second example of a large ALJ structure, with 80 ALJs (the second largest ALJ contingent of the agencies studied). DOL's Chief ALJ is supported by a Deputy Chief ALJ and two Associate Chief ALJs. Each of the district offices has a District Chief ALJ.

DOL's Chief ALJ has overall administrative responsibility for DOL's ALJ system. The Chief ALJ controls budgeting, personnel and staffing, and exercises general administrative control (e.g., issues reports, and manages the docket section). The Deputy Chief ALJ and the two Associate Chief ALJs assume control over the major subject areas: Federal Black Lung cases,[54] Longshore and Harbor Workers Compensation Act cases,[55] and traditional cases. The Deputy and the two Associates each assume responsibility for one subject area, and they coordinate ALJ activity in that area among the various offices.[56] The docket office in Washington manages case intake (in the sense of controlling the docketing and sending cases to the appropriate offices). The Deputy and Associates make sure that cases are progressing through the system. In addition, they provide guidance to ALJs on legal issues that arise in their areas.

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[54] This jurisdiction is derived from the Federal Mine Safety & Health Act, 30 USC §801 *et seq.* (1988), Black Lung Benefits Act of 1972, 30 USC §901 (1988), Black Lung Benefits Report Act of 1977, 30 USC §901 (1988), Black Lung Benefits Revenue Act of 1977, 30 USC §934 (1988), and the Black Lung Benefits Amendments of 1981, 30 USC §801 (1988).

[55] These cases provide for recovery when an individual suffers disability or death on navigable waters of the U.S., and when recovery is not available under state workers' compensation laws. 33 USC 901, *et seq.* (1988).

[56] "Traditional" cases involve a variety of matters including wage and hour, child labor, discrimination, immigration (foreign workers), and various civil penalty cases including whistle blower cases. They do not include Black Lung, or Longshore and Harbor Worker cases.

B. Non-ALJ Administrative Systems

In agencies that have non-ALJ systems, non-ALJs assume many of the responsibilities handled by chief ALJs. Non-ALJs are required to respect ALJ independence, but they are allowed to be actively involved in the administration of ALJ offices.

1. EOIR

EOIR's CAHO performs the dual functions of administrator and appellate reviewer. As an administrator, the CAHO has many responsibilities. The position description states that he "is responsible for providing program management, oversight, and leadership for a work force of Administrative Law Judges and support staff."[57] These responsibilities include the administrative "nuts and bolts." On his own, or through subordinates, the CAHO assigns cases, arranges for translators and court reporters, handles travel arrangements and office facilities, and supervises the support staff. He is also involved in EOIR's budgeting process. The CAHO also bills for ALJ time when they hear cases for other agencies.

One of the Associate Chief ALJs assumes responsibility for the Black Lung docket while the other assumes responsibility for the Longshore and Harbor Workers docket. The Deputy Chief ALJ is in charge of overall administration plus the traditional program. Black Lung cases, combined with Longshore and Harbor Worker Cases, account for about 80% of DOL's docket. Traditional cases account for the remainder of the docket. However, in terms of work, traditional cases consume more than 20% of the resources. Most of the Black Lung cases are handled at the Pittsburgh, Cincinnati, Camden and Fort Lauderdale offices. Longshore and Harbor Workers cases are handled at the San Francisco, New Orleans, Hampton, and Boston. The D.C. office handles all case types.

[57] Position Description, Chief Administrative Hearing Officer, Introduction. These responsibilities include a variety of functions including:

> preparation, promulgation and maintenance of rules of procedure governing proceedings before Administrative Law Judges. The incumbent is also responsible for the overall management and supervision of the Office of the Chief Administrative Hearing Officer and for the formulation and submission of requests for resources to the appropriate officials.

Id.

2. Interior

DOI's Director has overall responsibility for the ALJs as well as for Interior's review boards.[58] The Director exercises general administrative authority over the ALJ offices. The Director controls the level of support staff available to each office, and also makes decisions regarding budget allocations, supplies, assignment of support staff, office allocation, furniture and computer purchases. ALJs manage their own dockets.

Because the Director is located in the Washington, D.C. area (the Virginia suburbs), and the ALJs are scattered around the country, each of the ALJ offices has some form of local management system. For example, the Salt Lake City office (three ALJs) is administered by a District Chief ALJ. The District Chief, who does not receive additional pay, signs time sheets, resolves disputes, and handles staff performance reviews. For these reviews, the other two ALJs are the rating officials and the District Chief is the reviewing official. The Knoxville office has a law clerk and a secretary who does docket work. The ALJs who probate estates manage their own offices.

3. USPS

USPS' JO exercises general administrative authority over the ALJ office.[59] Historically, USPS has had a Chief ALJ (it now has an Acting Chief ALJ), but the Chief ALJ's functions are limited.[60] The JO partially supervises the lone secretary, controls case assignment (if a second ALJ is hired),[61] and is generally responsible for making sure that the workload is being properly handled. But the JO assumes control over most other administrative matters. He controls the docket section, approves travel and leave, allocates office space, maintains financial control, and is responsible for preparing the JO's Office budget (which includes the ALJ). The JO has responsibility for issuing procedural regulations.[62]

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[58] 43 CFR §4.1 (1992). He cannot review the performance of the ALJs, but he does review the chairmen of Interior's review boards.

[59] 39 CFR §226.2(e)(1)(vi) (1902).

[60] At the time of the interview, USPS' ALJ had recently spent a good deal of time on administrative matters - about 50% of his time. USPS was trying to hire a new ALJ, and the existing ALJ was heavily involved in the interviewing process. The new ALJ was being selected by a panel composed of the existing ALJ, the JO, and the Associate JO.

[61] There are a few cases over which the AJs and the ALJs have concurrent jurisdiction. The JO assigns those cases.

[62] 39 CFR §226.2(e)(1)(iv) (1992):

> The Judicial Officer is responsible for:
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> ...
>
> (iv) Revising or amending the rules governing eligibility to practice before the Postal Service, revising or amending Postal Service rules of practice governing

The JO, in consultation with the Chief ALJ, makes decisions about the level of support staff provided to the ALJ office both as to secretaries and law clerks.[63]

4. NRC

The Chief AJ, who is assisted by two Deputy Chief AJs, reports to the NRC's Chairman.[64] One of the Deputies deals with the many technical people consulted by the office. The other deputy deals with legal issues. Both the Chief and one of the Deputies (the one who handles legal issues) are members of the Senior Executive Service (SES), and are subject to performance reviews on their management functions. The Chief AJ performs the reviews on the Deputies.

IV. Analysis of the Systems

As the foregoing discussion suggests, ALJ offices can be administered in different ways. ALJ offices can be administered by their peers through a relatively autonomous chief ALJ system. They can also be administered by non-ALJs, including directors, judicial officers, chief hearing officers, and administrative judges (AJs). Some agencies use a combination of the two administrative approaches under which a chief ALJ is appointed, but a non-ALJ exercises substantial administrative authority over the ALJ office.

Is one administrative system preferable to the other? More to the point, is it objectionable to have non-ALJs exercising administrative control over ALJ offices? Alternatively, is it preferable to have non-ALJ administrators? This section analyzes these questions.

A. APA Provisions

The APA offers little guidance on these issues. It is possible to argue that ALJ offices should not be administered by non-ALJs. The APA gives ALJs protections designed to guarantee their independence (e.g., prohibitions against dismissal without cause as well as against performance reviews), and it can be argued that non-ALJ administration of ALJ offices threatens to compromise this

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proceedings conducted under the Administrative Procedure Act, and issuing and revising rules of practice for other proceedings.

[63] For example, at the time of the interview, USPS was trying to hire a new ALJ and the existing one was leaving the agency. The JO stated that he planned to consult with the new ALJ about whether to replace the departing ALJ or hire a law clerk.

[64] The Chief AJ stated that he used to meet with the Chairman every month or so, but that some Congressmen became concerned about whether the Chairman was trying to improperly influence pending cases. As a result, the Chief AJ meets infrequently with the Chairman, and the Chief functions very independently today.

independence. But the APA does not require that ALJs administer ALJ offices. On the contrary, under that Act, Congress allowed ALJs to be assigned to specific agencies, and to report to non-ALJs within those agencies.[65]

B. The Alleged Disadvantages of non-ALJ Administrative Systems

Since the APA does not prohibit agencies from using non-ALJ administrators, the real issue is whether it is desirable to have non-ALJ administrators in ALJ offices. Many arguments can be advanced for excluding non-ALJs from active involvement in ALJ offices.

1. ALJ Comfort Levels

Most ALJs are hostile to the idea of a non-ALJ administrator in an ALJ office. In interview after interview, ALJs expressed a strong preference for having ALJ offices administered by ALJs and grave reservations about having those offices administered by non-ALJs. ALJs are comfortable with non-ALJ administrators only when those administrators are subordinate to chief ALJs.

ALJs articulated a number of reasons for preferring chief ALJs. Many ALJs view chief ALJs as their peers, and believe that chief ALJs are more likely to understand the problems that ALJs confront. Chief ALJs have heard cases and experienced the problems ALJs confront on a day-to-day basis. In addition, since most chief ALJs continue to hear cases during their tenure as Chief, they remain in touch with the concerns of ALJs.

ALJs are also concerned about the type of people who become non-ALJ administrators. Many ALJs fear that non-ALJ administrators are excessively inclined towards detail, and will complicate ALJs' lives with unnecessary intrusions. One ALJ worried that non-ALJs would not have enough to do, and might create work for themselves by, for example, reviewing ALJ decisions for punctuation and format. A number of ALJs regard non-ALJ administrators as bureaucrats who will try to impose unrealistic and unworkable administrative systems on them, thereby interfering with ALJ independence in the name of efficiency.[66]

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[65] For example, SSA's OHA reports to SSA's Associate Commissioner.

[66] Some ALJs expressed concern about whether non-ALJs would be sensitive to the demands placed on ALJs. For example, one ALJ stated that ALJs have a funny life. They have to be ready to travel for hearings, but cases often settle so that the hearings are cancelled. This ALJ believes that it is important to give ALJs some leeway so that, if they are more comfortable renting a car rather than taking a cab, or they are more comfortable staying in a particular hotel, they should be allowed to do so even if it costs a little more. This ALJ worries that non-ALJ managers will not be as sensitive to ALJ needs and preferences.

Several ALJs expressed particular concern about non-ALJ administrators who serve in the dual capacity of administrator and appellate reviewer. Many ALJs feel that this dual role is inappropriate, and argue that it presents an appearance of impropriety. They worry that administrator-reviewers will try to interfere with their decisional independence.

Whether or not these concerns are valid, the simple fact remains that most ALJs are uncomfortable with the idea of a non-ALJ administrator in an ALJ office. One SSA RCALJ underscored this point. He stated that he witnesses the antipathy of ALJs towards professional administrators on a day-to-day basis. This RCALJ stated that HOCALJs prefer to communicate directly with him even on issues that can be handled by regional administrative staff.

A few ALJs, generally those who are dissatisfied with their chief ALJ for one reason or another, were more receptive to the idea of a non-ALJ office administrator. Some of these ALJs enthusiastically supported the concept. These ALJs had a number of complaints about the chief ALJ system. Some claimed that many chief ALJs brag about their political connections, and act like “little gods” playing favorites among ALJs in terms of case assignment and travel. These ALJs claim that litigants before their agencies are aware of ALJ favoritism, especially in regard to case assignment, and are able to engage in forum shopping.

Some ALJs who criticize the chief ALJ system believe that professional (non-ALJ) administrators would improve the functioning of their offices. Some felt that professional administrators would not be political appointees and would function more effectively. They also felt that since professional administrators would be subject to performance reviews they would be less inclined to play favorites and more inclined to use resources efficiently.

Many of these criticisms of the chief ALJ system seem, on balance, to be ill-founded. There is nothing to suggest that non-ALJ administrators are any less likely to be political appointees than are chief ALJs. Indeed, as will be discussed further below, one of the criticisms levelled against Interior’s non-ALJ Director system is that most prior directors have been political appointees.

Those ALJs that criticize the chief ALJ system are a distinct minority. The overwhelming majority of ALJs favor the chief ALJ system, and do not prefer non-ALJ administrators. Criticisms of the chief ALJ system seem to involve an adverse reaction to a particular chief ALJ who may, in fact, be playing favorites. However, these criticisms do not suggest that there is a flaw in the chief ALJ system itself. The flaws stem more from human nature. A chief ALJ can be fair and impartial, or can play favorites. A professional administrator can do likewise. Neither is inherently more likely to play favorites than the other.

2. Public Perceptions

The mere existence of a non-ALJ administrator in an ALJ office may cause the public to have less confidence in the agency's adjudicative system. ALJs are supposed to decide cases impartially and independently, free of agency coercion. When an agency appoints a non-ALJ to administer an ALJ office, it can undercut the appearance of impartiality and independence. The public may fear that the non-ALJ administrator will interfere with ALJ decisional independence, thereby affecting the outcome of cases.

But the mere fact that ALJs are hired by their agencies, and work in and for those agencies, creates perception problems. Under the current system, ALJs must report to non-ALJs at some point in the agency's structure. This is true whether or not ALJ offices are managed by chief ALJs or by non-ALJ administrators. Thus, perception problems are inevitable under the current system. SSA ALJs confirm this fact noting that some claimants worry that SSA ALJs are there to do the agency's bidding. ALJs in other agencies made similar comments. Some ALJs feel that they must go to great lengths to dispel these beliefs.[67]

Whether perception problems are more severe when ALJ offices are administered by non-ALJs (rather than by chief ALJs) is debatable. Many agencies (e.g., DOT, EPA) handle relatively complex matters involving parties represented by attorneys. It is doubtful whether these attorneys or their clients lack confidence in the process when ALJ offices are administered by non-ALJs. These attorneys (and through them their clients) probably understand the nature of the ALJ position and the protections provided to ALJs, and probably do not fear the presence of non-ALJ administration. The perception problem is, perhaps, most severe at SSA because it deals with unsophisticated claimants. If SSA local offices were supervised by non-ALJs, and claimants were aware of this fact, they might have even less confidence in the system. But most SSA claimants probably know little about how ALJ offices are administered. Indeed, some probably know little about the differences between ALJs and AJs.

3. Decisional Independence

Many ALJs fear that non-ALJ administrators will interfere with their decisional independence. During the interviews, ALJs stated and restated this concern. ALJs worry that non-ALJ administrators will pressure ALJs to decide cases in particular ways or based on inadequate evidence. They also fear that non-ALJ administrators will reward ALJs who render decisions that the administrator likes, or punish ALJs who render decisions that the administrator dislikes. They fear that administrators will do so through their allocation of perks, equipment, support staff, office assignments, and case allocation.

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[67] In commenting on these concerns, EPA's Chief ALJ noted that his office found for the agency only about 50% of the time over a two and one-half to three year period.

But many of the ALJs who expressed these concerns pointed to SSA as an example of how things can go wrong. They often referred to SSA's efforts to impose quota requirements. Many ALJs fear that, if non-ALJ administrators were installed at other ALJ offices, the drive for quotas would be intensified. These ALJs worry that non-ALJs do not understand the judicial function, and will encourage ALJs to decide cases based on insufficient evidence merely to "get the cases out." ALJs contend that these drives for production will undercut their independence.[68]

This reference to SSA is interesting because SSA uses the chief ALJ system. SSA's Chief ALJ reports to SSA's Associate Commissioner for Hearings and Appeals who is not an ALJ, but in all agencies chief ALJs end up reporting to non-ALJs. SSA does make extensive use of administrative and management personnel, but those personnel report to chief ALJs. Thus, SSA's problems would seem to be more attributable to the types of issues and problems that arise in a large administrative bureaucracy. HOCALJs complain that they are figureheads. They handle personnel matters, and individual problems that arise in their offices, but overall policy is set by others. These problems cannot be eliminated without creating a separate ALJ corps, thereby removing ALJs from the agencies for which they adjudicate.[69]

While ALJ concerns about interference by non-ALJ administrators are understandable, they are not borne out by the facts. The evidence suggests that non-ALJ administrators can confine themselves to administrative tasks while at the same time allowing ALJs to exercise decisional independence. Indeed, much of what is done by chief ALJs is administrative rather than decisional,[70] and non-ALJ administrators are quite capable of performing these administrative functions. Of course, they cannot decide cases reserved by statute for ALJs, and they cannot subject ALJs to performance evaluations. But non-ALJs can hire and assign support staff (e.g., secretaries, file clerks, staff attorneys or law clerks), evaluate the support staff (with input from the ALJs), manage the support staff (providing counseling, discipline, rewards and promotions as appropriate), and make decisions about travel and leave. In addition, non-ALJs can allocate office space, order supplies, order furniture and computers, and arrange for logistical support (e.g., computer maintenance). Finally, non-ALJs can prepare budgets and assign cases.

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[68] One ALJ worried that non-ALJs would not respect the fact that ALJs need independence, or that they need to build a sufficient record. He suggested that "bureaucrats" often tell ALJs to follow the agency's unstated policies including its manuals and guides. This ALJ felt that most ALJs pay little attention to manuals and guides.

[69] Some argue for this separation:

> The problem in the Federal Administrative Judiciary is not whether the adjudicative systems are managed by judges or non-judges. The problem lies in the untenable employment relationship existing between employer agencies and employee since the passage of the APA. That employment status grants to the agency an administrative oversight management power that is not compatible with due process. This is so, whether judges or non-judges are the managers in such systems. The true solution is to remove the administrative law judges from housing and employment in the 31 Federal agencies, and to establish them in a truly Unified Corps of Administrative Law Judges as contemplated by S.486 and HR. 2586.

Letter from Judge Charles N. Bono to Author, at 7 (Aug. 30, 1993) [hereinafter *Bono Letter*].

[70] For example, FCC's Chief ALJ has ultimate responsibility for the following things: personnel, preparation of reports, approval of time and attendance reports, ordering of supplies and furniture, review of performance appraisals, determination of awards, and general administrative supervision. In addition, he makes sure that FCC ALJs are aware of rulings issued by the federal courts and the Commission.

The evidence suggests that in performing these functions non-ALJs are quite capable of respecting ALJ independence. For example, a former USPS ALJ disliked the idea of having his office administered by USPS' JO. However, he flatly stated that the JO did not interfere with his decisional independence. One EOIR ALJ stated that his CAHO has been "very sensitive" to issues of ALJ independence. Other EOIR ALJs agreed. They stated that the CAHO does not discriminate against them in regard to office assignments, etc. The CAHO, himself, stated that he was very reluctant to talk to ALJs about their decisions. The CAHO stated that he was able to perform his administrative functions and respect ALJ decisional independence. NRC's Chief AJ made similar comments.[71] NRC's ALJ stated that the Chief AJ had not attempted to interfere with his decisional independence.

No ALJ, at any agency, complained that non-ALJs played favorites with resources in an attempt to influence their decisions. One ALJ offered the observation that, to the extent that a lack of evenhandedness exists in agencies, it is as likely to come from a Chief ALJ as a non-ALJ, and to have nothing to do with decisional independence.[72]

But, at both USPS and EOIR, one would not expect to find interference. Both the JO and the CAHO have the right to review most ALJ decisions and can reverse decisions that they dislike (provided, of course, that they give adequate explanations for their actions).[73]

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[71] The Chief AJ stated that he is well aware of the fact that judges need to function independently. He also stated that because of the importance of the NRC's cases, which sometimes involve nuclear power plants with investments of up to six billion dollars, and Congress would be particularly upset if the Chief AJ tried to exercise undue influence over the NRC's ALJ or AJs. Nevertheless, the Chief AJ stated that, if he had productivity problems with an ALJ, he would first try to speak with him about the problem.

[72] NRC AJs stated that neither the NRC, nor the Chief AJ, had tried to improperly influence their decisions. One AJ suggested that any attempt to exert such influence would not be tolerated and would result in massive resignations.

[73] 39 CFR §226.3(e)(1)(vi) (1992).

The situation at Interior may be less positive. Even there, few ALJs complained about directorial interference with their decisionmaking.[74] In addition, some of the ALJs who probate estates had complaints about prior Directors. None complained that Directors instructed them how to decide particular issues, or told them to find in favor of certain parties. ALJs did complain that prior Directors tried to impose quotas on them, and urged them to preside over more cases. ALJs also alleged that some prior directors did not understand the difference between administration and meddling, that some directors have urged them to decide cases based on less evidence than ALJs thought was necessary, and that Directors tried to subject them to performance reviews and to treat IP ALJs differently than other ALJs.[75]

These problems may be attributable to peculiarities of the ALJ's past situation. Over the years, there has been much friction between the former IP ALJs and the Director's office regarding the status of the ALJs. DOI had trouble finding qualified applicants who were willing to accept IP ALJ appointments. So, it obtained special permission to hire ALJs without using the register,[76] and it hired many of the probate ALJs in this way. DOI usually hired attorneys from the surrounding areas, and tried to get individuals who were knowledgeable about Indian probate law. Because of the way the IP ALJs were hired, there was disagreement about whether they were subject to performance reviews.[77] For some time, DOI took the position that the probate ALJs were subject to performance reviews. The issue now appears to have been settled by virtue of a statutory change. Former IP ALJs are now recognized as ALJs, and are not subject to performance appraisals.

IP ALJs also complained about the fact that Interior's Chief ALJ was riffed. Some IP ALJs believe that he was riffed in retaliation for working with the ALJs to help them obtain ALJ status. Interestingly, the ALJs who handle land cases disagree. They urged the Director to abolish the Chief ALJ position because they thought it was unnecessary.[78] These ALJs felt that since DOI does not hold any ALJ hearings in Washington, D.C., it did not need to have a Chief ALJ located there. Moreover, one of the reasons the Chief ALJ position was filled (following a vacancy of more than eight years) was to rate the former IP ALJs. Once the former IP ALJs received full ALJ status, there was little justification to retain the

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[74] There is one major exception: an ALJ who handles probate cases did complain that an acting Director (who was in the position for only a short time) ordered him not to issue an opinion.

[75] Edward A. Slavin, Jr., *ALJ Independence Undermined*, 31 JUDGE'S J. 26 (1992).

[76] 25 USC §372-1 (1992).

[77] In an effort to improve their status, the former IP ALJs took the ALJ examination, passed, and were approved for the ALJ register.

[78] Some ALJs who handle land cases stated that it would be appropriate for DOI to have a Chief ALJ or a Director, but not both. These ALJs were unhappy with the last Chief ALJ's performance.

Chief ALJ.[79] The Chief's appeal to the MSPB was denied, and MSPB's decision was upheld.

Whether the situation at Interior presents a serious indictment of the non-ALJ administrative system, or is simply an anomaly resulting from the peculiarities of the IP ALJ position, is debatable. ALJs who handle land cases make no complaints about directorial interference with their independence. Only the former IP ALJs complained, and their complaints seem to be historical rather than contemporary.[80]

4. Susceptibility to Agency Influence and Manipulation

Many ALJs worry that non-ALJ administrators will be agency pawns subject to manipulation. These worries reflect an underlying concern about the issue just discussed: whether non-ALJ administrators will interfere with ALJ decisional independence. There are legitimate reasons for these concerns. Most non-ALJ administrators have little job security, and certainly do not have the protections afforded to chief ALJs. They are subject to performance reviews, and may be susceptible to agency pressure.

ALJs stated their concerns in different ways. One ALJ believes that non-ALJ administrators are "disasters," arguing that they develop an affinity for their agency's mission. In an effort to "help" the agency carry out its mission, non-ALJs undermine the integrity of the decisionmaking process.

But the facts do not suggest that non-ALJs have been subjected to such pressure or that they have yielded to it. As indicated, ALJs who serve at agencies that have non-ALJ administrators repeatedly indicated that those administrators have not attempted to interfere with their decisional independence with the sole exception of the IP ALJs. Non-ALJ administrators did not complain about agency pressure.

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[79] In 1990, a blue ribbon panel recommended elimination of the ALJ position:

> The position of Chief Administrative Law Judge (ALJ) for the Hearings Division appears unnecessary now that the Indian Probate ALJs have been converted to section 3105 appointments under the Administrative Procedure Act, thereby extinguishing the Chief ALJ's supervisory duties. Since the ALJ field offices require little or no management direction in conducting their day-to-day activities, the Director's Office and the administrative Officer could perform the remaining administrative tasks performed by the Chief ALJ on behalf of the ALJ field offices.

The Twentieth Anniversary OHA Blue Ribbon Committee, Final Report on the Organization, Management and Operations of the Office of Hearings and Appeals, Executive Summary, at ii (August 1990) (hereinafter *DOI Blue Ribbon Committee*); *see also id.* at 20-22.

[80] *But see id.*

5. Case Assignment Concerns

Many ALJs were worried about the desirability of having non-ALJs control their case assignments. Some ALJs worry that non-ALJs might assign cases in a manipulative way designed to achieve particular decisional results. Many ALJs believe that non-ALJs would not assign cases in a rational manner. They worry that non-ALJs will literally apply the APA's requirement that cases be assigned in "rotation"[81] without taking into account the fact that some judges already have heavy loads while other judges are light loaded, or that some cases are more difficult than others. Thus, the workload will not be equitably distributed.

Some ALJs fear that non-ALJs will not take practical considerations into account in assigning cases. For example, one ALJ believes that non-ALJs might assign cases without regard to geographical considerations. Thus, one judge may be assigned a case in a distant city and a second judge assigned a case in the same city even though it might be more efficient to assign both cases to a single judge. The commenting ALJ believes that a chief ALJ would recognize that a single ALJ might be able to hear multiple cases during a trip, and might ask that judge to hear both cases.[82]

Most ALJs were far more confident that chief ALJs would assign cases rationally.[83] They view chief ALJs as their colleagues and peers and trust them to understand the realities of the situation. They worry that non-ALJs will not appreciate or understand the practical problems associated with case assignment. A few ALJs disagree. They claim that chief ALJs sometimes play favorites in assigning cases. Some of these latter ALJs even suggest that a non-ALJ might assign cases more fairly and more rationally.

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[81] 5 USC §3105 (1988).

[82] Chief ALJs stated that they take a variety of considerations into account in assigning cases. For example, although EPA's Chief ALJ tries to assign cases by rotation, he finds that it is difficult to do so. Strict adherence to rotation would result in inequitable workloads. The Chief ALJ tries to even out the workload by taking into account how much time each case will require. If a judge is working on a particularly difficult case (*e.g.*, a cancellation case) which can require a great deal of effort and time to decide (sometimes as long as six months), and which must be decided within strict statutory time limits, the Chief ALJ might take that judge out of the rotation. The Chief ALJ tries to make sure that each judge gets a fair proportion of cases under each statute.

[83] However, some ALJs complain that chief ALJs *do not* assign cases in strict rotation. A recent ALJ report contained the following recommendation:

> Recommendation No. 11: Restore case assignment of Administrative Law Judges to cases on a strictly rotational basis.
>
> The APA and due process under the Social Security Act require assignment of judges on a strictly rotational basis. This strict rotational assignment prevents the agency from selecting certain judges to hear cases and thereby, in many instances, control the outcome of cases. The agency does not enforce strict rotational assignments and permits wide deviation therefrom.

Statement of the Association of Administrative Law Judges, Inc. to the Disability Advisory Committee, at 17 (May 1, 1989).

While case assignment concerns are legitimate, no examples were found of instances when non-ALJs have assigned cases poorly. Of the agencies studied, only EOIR's CAHO assigns cases. At USPS, the JO does not assign cases except for a few cases over which the AJs and the ALJ have concurrent jurisdiction.[84] The Chief ALJ assigns cases over which the ALJs have exclusive jurisdiction. Interior's Director is not involved in ALJ case assignment either, since DOI's traditional ALJs handle cases from their regions. Only one of the traditional offices has more than one ALJ, and that office has a District Chief ALJ who assigns cases. IP ALJs handle cases that arise in their own geographical areas.

At EOIR, the only agency where a non-ALJ handles case assignment, there appear to be no problems. When EOIR's CAHO was asked about how he assigns cases, he was not told of the criticisms that ALJs had raised about non-ALJ case assignment. Nevertheless, the CAHO stated that he takes into account many of the factors that the ALJs suggested were important. The CAHO delegates the assignment responsibility to his records management staff instructing them to assign cases on a rotational basis, but to do so only to the extent "practicable." The staff is told to take into account ALJ case loads, and to think about the geographic location of the cases to the extent that a hearing is likely to be held.[85] Thus, the only criticism that could be raised about the CAHO's assignment of cases is that he delegates the case assignment responsibility to subordinates. But several chief ALJs stated that they also delegate this responsibility to their staff (presumably with instructions, as well).

6. Absence of Decisional Leadership

Of course, there are some functions that non-ALJ administrators cannot perform. For example, non-ALJs might be reticent about providing leadership on decisional issues. Many chief ALJs provide such leadership distributing recent rules, regulations and decisions to fellow ALJs, and arranging meetings to discuss substantive issues. DOL's ALJ office provides the best example of such leadership. As noted, DOL has a Deputy Chief ALJ and two Associate Chief ALJs who divide responsibility along substantive lines. The Deputy and the Associates review and research legal issues in their areas, and they issue advisory opinions suggesting how those issues ought to be handled. In addition, they monitor the post-decision disposition of ALJ decisions, and keep track of pending legislation in their areas.

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[84] 39 CFR §226.2 (e)(1)(vi) & (3) (1988).

[85] However, geographical considerations are not a paramount concern for EOIR. EOIR's CAHO stated that many of EOIR's cases are settled, or they result in default or summary judgments. In addition, many matters are handled by mailed-in pleadings, or by telephone conferences. As a result, the office holds few hearings, and it is not essential to assign cases strictly by geographical considerations. The CAHO suggested that, if the situation changes, he might have to rethink things.

Of course, chief ALJs vary regarding the extent to which they provide leadership on substantive issues. Not all chief ALJs provide decisional leadership of this sort. In most offices, there is some give and take on substantive issues. For example, EPA ALJs circulate issued orders and decisions to each other, and they sometimes rely on these orders and decisions as precedent. In addition, at some ALJ offices, there are periodic meetings that focus on substantive issues. At virtually every office, there are informal discussions between ALJs.

At those offices that have non-ALJ administrators, there are very few substantive discussions between the administrators and the ALJs. Non-ALJ administrators are reluctant to discuss substantive issues with ALJs for fear that they will be accused of interfering with ALJ decisional independence. For example, USPS' JO has no policy discussions with USPS' ALJ. To the extent that the JO disagrees with the ALJ's position on particular issues, he expresses that disagreement through the appellate process.

Although non-ALJs cannot provide leadership on substantive issues, this drawback is not a severe one. Even though a non-ALJ administers an ALJ office, an ALJ can provide leadership on decisional issues. Thus, a lead or chief ALJ can organize seminars and ALJ meetings, distribute decisions, etc. Even without such a system, ALJs are likely to have informal discussions about significant issues. In many offices, the Chief ALJ is a senior ALJ who is very familiar with agency policy positions, and who serves as a resource for other ALJs. Even without a chief or lead ALJ system, more senior judges can be expected to provide leadership to other ALJs.

7. Dealing With Underproductivity

One potentially serious concern about non-ALJ administrators is whether they can deal with ALJ underproductivity as effectively as chief ALJs. Because non-ALJs are required to respect ALJ independence, non-ALJs may be a bit "skittish" about reprimanding ALJs for underperformance for fear that they will be accused of interfering.

At those agencies that have non-ALJ administrators, underperformance does not seem to be a problem. Moreover, non-ALJs do not seem to be reluctant to talk with ALJs about underperformance. USPS' JO stated that he has not had a problem with ALJ underperformance. But, if he did encounter such a problem, he would deal with it directly. He would first discuss the problem with the ALJ, and he might encourage or cajole the ALJ as necessary. He might even urge the ALJ to get help from an appropriate source if needed (e.g., if the ALJ suffered from a drinking problem).[86] In taking these actions, the JO would be respectful of the ALJ's independence. EOIR's CAHO stated that he too would deal with an underperforming ALJ directly. He would try to ascertain the source of the problem, and direct the ALJ to a place where help could be obtained.

8. Greater Sensitivity to the Needs of Claimants

Some SSA ALJs argue that ALJs need to be in charge of ALJ offices in order to ensure that those offices are responsive to claimants. Those who take this position point out that the ALJs are in contact with the claimants, and argue that ALJs need to be in charge of ALJ offices because they are better able to determine what needs to be done to make the offices responsive to those claimants. Whether this claim is correct is difficult to determine. ALJs did not offer any examples to support their claims. Moreover, ALJs who worked in offices administered by non-ALJs did not complain about their offices being unresponsive to the public. On the contrary, USPS' ALJ stated that the USPS runs a first class judicial operation from the standpoint of the public.

9. Excessive Attention To Detail

Some ALJs worry that non-ALJs will give excessive and unnecessary attention to administrative detail. This concern is a restatement of ALJ concerns about the type of person who become non-ALJ managers.

> Whether this concern is valid is unclear. In only one instance did an ALJ who served under a non-ALJ complain about excessive attention to detail. This ALJ complained that the non-ALJ administrator, who also has appellate functions, gives "keen attention to detail." The non-ALJ is interested in the ALJ office's policies and procedures regarding travel, leave, scheduling of out-of-town hearings, etc. This ALJ felt that his office should be free of non-ALJ control. Nevertheless, the ALJ stated that the office was very professionally run.

It is doubtful whether the "attention to detail" concern represents a damning indictment of the non-ALJ managerial system. Excessive attention to detail is a personality characteristic that either one does or does not have. Even a chief ALJ can be excessively inclined towards detail, and therefore may be inclined to interfere. By contrast, a non-ALJ might not be inclined to excessive detail. There is nothing about the nature of non-ALJs to suggest that they would be more inclined to detail. Moreover, attention to detail might be regarded as positive to the extent that it helps limit abuse.

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[86] USPS has an active employee assistance program which is available to all USPS employees including the AJs and ALJs.

10. ALJs Should not Report to Policy Personnel

Some argue that many non-ALJ administrators are policymakers, and that ALJs should not be asked to report to policymakers. This argument has some validity. JOs, CAHOs, and directors have a limited policymaking role in their agencies. They are not involved in investigating or prosecuting cases, and could not administer ALJ offices if they were so involved.[87] But non-ALJ administrators are involved in the adjudicative process, reviewing and deciding questions of law. Thus, they make policy. ALJs object to having ALJs report to non-ALJ policymakers. ALJs fear that such policymakers will try to interfere with ALJ independence.

There is no empirical basis for these concerns. At none of the ALJ offices studied was there any evidence that nonALJ administrators tried to interfere with ALJ decisional independence. Moreover, none of the ALJs who expressed this concern were able to offer specific examples of non-ALJ interference. Indeed, as suggested earlier, to the extent that non-ALJs have the right to review ALJ determinations on appeal, they have little incentive to interfere with ALJ decisional independence. If the non-ALJ does not like the ALJ's decisions, the non-ALJ can simply reverse them.

C. The Arguments for Non-ALJ Administrative Systems

Significant arguments can be made in favor of using non-ALJ administrators in ALJ offices.

1. Most Non-ALJ Administrative Systems Involve Judicial Personnel

All the non-ALJ administrative systems currently used have the advantage that they involve judicial personnel. For example, USPS' JO is the head of his agency's judicial department.[88] He has administrative control over USPS' Office of ALJs, and USPS' appellate processes and its Board of Contract Appeals (BCA). In addition, he is chairman of USPS' BCA and he hears appeals from USPS' ALJs. EOIR's system is similar. EOIR's CAHO administers his agency's ALJ office, and he serves as the appellate reviewer. Interior's system likewise involves its Director in the review process. In addition, it gives the Director supervisory and oversight responsibilities over Interior's review boards as well as over Interior's ALJ and IP ALJ offices, which are scattered around the country.

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[87] 5 USC §554(d)(2) (1992).

[88] 39 CFR §226.2(e)(1992).

Given that ALJs are housed in the agencies for which they adjudicate, non-ALJ involvement in ALJ offices is inevitable. At some point in the administrative structure, ALJs must report to non-ALJs. This is true even in agencies that use the chief ALJ system. In these latter agencies, the chief ALJs report to non-ALJs. For example, SSA's Chief ALJ reports to SSA's Associate Commissioner for Hearings and Appeals (who also serves as head of SSA's Appeals Council). Many chief ALJs report to their agency's Assistant Secretary for Administration.[89]

JO, Director and CAHO systems provide nothing more than a different way to structure non-ALJ management. Instead of having the ALJ office report to an assistant secretary or an associate commissioner, ALJs report to the head of a judicial section.[90] The non-ALJ manager is the head of this judicial section, and administers not only the ALJ office but also other judicial offices. If ALJs must report to someone in their agency's structure, it can be argued that these "judicial managers" are less objectionable than non-judicial managers. Hopefully, those involved in the judicial process are more sensitive to the concerns of ALJs and the need for independence. In addition, judicial personnel should have a better understanding of what ALJs need to perform their jobs effectively.

But it is important to recognize that non-ALJ judicial managers generally exercise more control over ALJ offices than do others to whom ALJs report. When the chief ALJ system is used, ALJ offices tend to be relatively autonomous.[91] The chief ALJ reports to a non-ALJ, but other ALJs are insulated

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[89] For example, DOT's Chief ALJ reports to the Assistant Secretary for Administration, USDA's ALJ office reports to that agency's Assistant Secretary for Administration, and DOL's office reports to Labor's Deputy Secretary.

[90] One need not be an ALJ to understand the ALJ function. Most directors and JOs have worked as judges and therefore have a good understanding of what judges do. For example, USPS' JO came to USPS from the Defense Department's Board of Contract Appeals (BCA). Of course, ALJs might argue that the judicial function is different at the appellate level than at the trial level. Nevertheless, appellate judges understand the judicial function, and know what is required to prepare a legally sufficient opinion. This is particularly true when the appellate judge works in the same agency as the ALJs and reviews their work.

[91] For example, DOT's Assistant Secretary takes a hands-off approach to the ALJ office. He does not try to supervise that office, or to pressure it in any way. The Assistant Secretary does get involved in budgetary and general administrative matters. But most of the ALJ office's budget is offset by reimbursements from the agencies for which that office works. Nevertheless, the ALJ office has not encountered any problems in terms of equipment, personnel, etc. On the contrary, when the ALJ office needed additional FTEs to hire more people, the FAA provided them. The office has a sophisticated case tracking system, a copy machine and several printers.

USDA's Chief Judge has had similar experiences with his agency's Assistant Secretary for Administration. The Chief ALJ has served under three different Assistant Secretaries, but none of them have tried to interfere with the office's decisional independence. Assistant Secretaries have involved themselves in non-decisional administrative issues. For example, Assistant Secretaries have decided whether the office can buy computers, and whether it can hire additional personnel. In addition, the Assistant Secretaries have had different management styles. Some wanted to have weekly meetings with the Chief ALJ to talk about matters unrelated to decisional content (e.g., computers, software, participation from the non-ALJ by the existence of the chief ALJ. At agencies that have non-ALJ judicial managers, the non-ALJ actively administers the ALJ office. At EOIR, the CAHO assigns the cases, allocates and manages support personnel, etc. USPS has a chief ALJ system, but the JO actively supervises the administrative aspects of the ALJ office. The Chief ALJ has limited powers. Of course, this active supervision can be regarded as a positive to the extent that the non-ALJ provides oversight on the agency's behalf.

Interior's non-ALJ management system may be more objectionable than other administrative systems. The Director is a political appointee, and DOI has had a number of problems with its Directors over the years. DOI's ALJs believe that, even though the Directorship is an SES position, it is not a political plum and often attracts those who were unsuccessful in their attempts to obtain other political jobs. Given this situation, those who have filled the position have been of uneven quality, and there has been fairly high turnover — a new Director every year or two. On three occasions during the last 12 years, a Director has left the post for other than voluntary reasons.

There are other problems as well. Prior Directors were not ALJs, or even AJs, and ALJs complain that these Directors were unfamiliar with the judicial function. Few prior Directors had previously managed a judicial office, and were forced to learn the job from scratch. Interior's ALJs claim that this situation creates unnecessary problems. For example, ALJs believe that new Directors sometimes repeat mistakes made by prior Directors because they are not aware of the institution's prior history.[92]

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in various ethnic celebrations, etc.). Some Assistant Secretaries do not require the Chief ALJ to participate in these meetings.

Labor's Chief ALJ reports to his agency's Deputy Secretary. Over the years, the ALJ's relationship with the Deputy Secretary has varied depending on the Deputy Secretary. None of the Deputy Secretaries have tried to meddle in the ALJ office's affairs. However, they have occasionally called for status reports on pending cases. The ALJ office has not had budgetary problems although it does not always have as much money as it needs. The agency's failure to give the office more money has nothing to do with the content of the office's decisions.

[92] Interior's ALJs who handle land cases complain that, about every five years or so, a Director asks them to help with Indian Probate (IP) cases. The Director does so because the ALJs who handle probate cases have a backlog of work, and the land ALJs do not. According to the land ALJs, it would be more effective to hire an additional probate ALJ rather than to assign one of the land ALJs to IP cases. The land ALJs believe that IP cases are so different (so paperwork oriented) that it takes a land ALJ a long time to make the transition to IP cases and back, and land ALJs believe it is undesirable and inefficient for them to make the transition.

Land ALJs also complain about other problems resulting from the temporary nature of Interior's Directors. Interior tends to hire its law clerks on a temporary basis. The land ALJs would like to hire them on a permanent basis. ALJs complain that, by the time a clerk learns the job, the clerkship is about to end. The land ALJs have convinced some Directors to allow them to hire clerks on a permanent basis. However, by the time they get a Director convinced of this fact, the Director is leaving and the ALJs have to start all over with a new Director.

Interestingly enough, despite all these problems, some of Interior's traditional ALJs were in favor of abolishing Interior's chief ALJ position. They felt that the chief ALJ was a political appointee who did not function well, and they preferred direct administration by the Director.

2. Efficiency

The use of non-ALJ administrators might also be justified on efficiency grounds. In some agencies, the chief ALJ system is not practical. That system works well when an agency has a significant number of ALJs, and the agency can devote one ALJ (or at least a substantial portion of an ALJ's time) to administration. At an agency like SSA, which has 850 ALJs, or DOL, which has 80 ALJs, chief ALJ administration makes much sense. At these agencies, there are enough ALJs to justify allocating one or more ALJs to management.

But the chief ALJ system may make less sense at other agencies. Administrative functions can be time consuming. For example, one SSA RCALJ spends virtually all his time on administration, and one HOCALJ estimated that he spends about 50% of his time on administrative matters. The following chart provides an illustration of how much time some chief ALJs spend on administration.

Agency	**% of Time Spent on Administration**
DOT	25-50
FCC	Variable (5% to 100%)[93]
DOL (Chief ALJ)	75
DOL(Deputy & Associates)	60
Commerce (single ALJ)	50-80
SSA Chief ALJ	95-100
SSA RCALJs	50-100
SSA HOCALJs	30-50

While ALJs are performing these administrative functions, they are unable to decide cases. In addition, because most chief ALJs tend to be more senior judges, and they receive a supplement for serving as the chief judge, their agencies suffer a double loss. One of their most senior judges is diverted from the courtroom to administration and is paid extra for the diversion.

Non-ALJ administrative systems do not entirely eliminate these inefficiencies. Directors, CAHOs and JOs all exercise both administrative and judicial functions. For example, USPS' JO oversees the ALJ office, and serves as the appellate reviewer. In addition, he serves as Chairman of USPS' Board of

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[93] The Chief ALJ might spend all of his time on administration when a report is due to the Commission.

Contract Appeals. The same is true for EOIR's CAHO. He directly administers the ALJ office, but he is also involved in the appellate process. As a result, he divides his time about equally between administrating and judging. Interior's Director also performs appellate functions, and spends roughly 60% of his time on administrative duties. Thus, to the extent that Directors, CAHOs or JOs involve themselves in administrative matters, they are diverted from their judicial functions as well.

But the CAHO, Director and JO systems actually do have some efficiencies. To the extent that the agency's chief judicial officer is administering the rest of the agency's judicial offices, and can administer the ALJ office in addition, the judicial officer system allows the ALJs to focus on case production. For example, USPS currently has only a single ALJ. USPS' JO administers USPS' entire judicial structure with the help of an office manager, and is able to administer the ALJ office with little additional effort. As a result, USPS' ALJ does not have to spend time on general administrative matters. At Commerce, by contrast, the lone ALJ manages the office and spends 50% to 80% of his time on management responsibilities.

In other contexts, non-ALJ administrators may also make sense. Interior has ALJs spread all over the country with many of its offices having only a single ALJ. Under such circumstances, it may make sense to centralize the management function in Washington under one person. Of course, that person could be an ALJ rather than Interior's Director. However, in order to have a chief ALJ, Interior would have to hire an additional ALJ (as it once did). Moreover, since Interior's Director already manages Interior's appellate review boards, it may make sense to allow the Director to also manage the ALJ offices.

Of course, even if a non-ALJ judicial management system is used, ALJs may still have some administrative responsibilities. At USPS, the Chief ALJ assigns cases when USPS has two ALJs. At the time of the interview, the lone ALJ (who has since departed) was actively involved in the search for a second ALJ, and the search was consuming a significant percentage of his time. Nevertheless, because USPS has a JO, the Acting Chief ALJ is freed from a number of other administrative responsibilities (e.g., budgeting, coordinating with personnel management regarding support personnel).

3. Do Non-ALJs Make Better Administrators?

Some might argue that the non-ALJ system is justified by the fact that ALJs do not make good managers. ALJs, by virtue of their training and experience, are best suited to deciding cases. They usually have experience as lawyers and as judges, but few have been trained as administrators or in management techniques. Nevertheless, when ALJs are elevated to the chief ALJ position, they are expected to exercise both administrative and judicial functions. Whether an individual

ALJ successfully makes the transition from ALJ to chief ALJ depends on the person. But at least one chief ALJ, an SSA RCALJ, questions whether ALJs should even attempt the transition. In his view, ALJs do not make good managers.

Interestingly enough, ALJs who serve under chief ALJs generally did not complain about the quality or effectiveness of their chief. On the contrary, most ALJs are satisfied with their chief's performance. The few ALJs that are dissatisfied with their chiefs raise concerns (e.g., favoritism) that relate to human nature and which might not be eliminated under a non-ALJ system. Moreover, even though chief ALJs may lack managerial expertise in some areas (e.g., budgeting), they often seek outside help in those areas. For example, USDA's chief ALJ seeks assistance from his agency's budget personnel when he prepares the office's budget request.

4. Can non-ALJs More Effectively Deal With ALJ Underperformance?

An additional argument for non-ALJ administrators is that they may be better able to cope with ALJ underperformance and abuse. During interviews for this study, some ALJs and others discussed productivity problems in their agencies both in terms of quantity[94] and quality.[95] The interviews also revealed other problems.[96]

It is difficult to evaluate whether these problems are widespread or whether they justify a change in administrative structure. Although the interviewer received some complaints, no one suggested that the problems were commonplace. On the contrary, most ALJs denied that there was a problem.[97] One ALJ remarked that he can name on one hand the number of judges who should have been removed for underperformance. This judge thinks that many of these individuals should not have become judges in the first place. In his view, they simply do not understand and appreciate what is expected of them. A skeptic might suggest that these ALJ statements are self-serving, and that ALJs do not want to admit the existence of problems for fear that their admissions will fuel proposals for change.

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[94] As one ALJ stated, some ALJs tend to work less hard. He suggested a number of reasons: laziness, old age and ill-health.

[95] One ALJ stated that judges suffer no recrimination for handling a case poorly. The case may be remanded, thereby requiring the ALJ to look at it again, but few other repercussions ensue. One ALJ mentioned a second ALJ who repeatedly fails to adequately develop cases involving mental impairment issues because of ignorance and laziness.

[96] Some suggested that a few ALJs engage in attendance abuse. For example, reports were received that, while some ALJs are on travel, they schedule all of their hearings in the morning so that they can have the remainder of the day free, or they schedule hearings a day or so apart so that they have time for recreation. Of course, at times, short days or gaps are unavoidable. But reports were received that a few ALJs routinely abuse the system in this way.

[97] DOT's Chief ALJ stated that he has no problem with underproductivity. The office has a backlog, but it is gradually being reduced. The office could eliminate the backlog if it had additional funding.

Productivity problems are particularly difficult to evaluate. At a few agencies, certain types of cases are arguably generic. As a result, an agency might legitimately expect its ALJs to decide a certain number of cases per month. But, at most agencies, an ALJ's output cannot be assessed merely by looking at case dispositions. At the NRC, for example, some cases are small cases while others are large. Operating license cases are currently on the wane. But some licensing cases take three to five years to adjudicate, and involve large amounts of discovery. As a result, one case cannot always be compared to another. To do so is (as one AJ suggested) not to compare apples to oranges, but in some cases to compare apples to elephants. NRC's chief judge recognizes this fact and looks at a judge's caseload in assigning cases. Nevertheless, when pushed, most ALJs agree that some ALJs work less hard and are less productive than others.

When productivity problems exist, chief ALJs may not be in the best position to effectively deal with them. The strength of the ALJ system—collegiality—may constitute a weakness in this context. ALJs may be reluctant to confront ALJs who underperform or who engage in petty abuses. Would non-ALJ managers be better able to deal with ALJ underperformance, or with other problems? Non-ALJs must tread lightly to avoid interfering with ALJ independence,[98] and therefore may be less likely to confront an underperforming ALJ. But most non-ALJs stated that they were willing and able to confront any performance problems that arise.

Non-ALJs suggested that they were willing to confront other problems as well. USPS' JO takes a very active interest in the functioning of that agency's ALJ office. He does not interfere with the ALJ's decisional independence, but he does oversee all non-decisional matters. The same is true at EOIR.[99]

In the final analysis, managerial effectiveness probably depends on personality. Some non-ALJs will be effective administrators while others will not. The same is true for chief ALJs. In some offices that are administered by chief ALJs, chief ALJs are quite concerned about office productivity.[100] These chief ALJs meet regularly with their ALJs to discuss the state of ALJ caseloads. For example, DOL's Deputy Chief ALJ and Associate Chief ALJs monitor ALJ caseloads, and try to deal with problems as they arise so that cases move through the system as effectively as possible. DOL's Chief ALJ was referred to as a "real hands-on person" who would, if he concluded that any of his ALJs were having problems, meet with them and try to deal with their problems.

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[98] Some ALJs alleged that JOs and Directors have exercised too much control over ALJ offices. However, few examples of excessive control were offered. At one agency, ALJs complained about being required to sign-in and sign-out of the office. The ALJs viewed this requirement as excessive. The non-ALJ manager did not.

[99] USPS' JO carefully monitors ALJ travel, and would not permit ALJs to schedule hearings in a way that would give them "down days" if it was possible to avoid them.

[100] At Labor, the Chief ALJ, the Deputy Chief ALJ, or one of the Associate Chief ALJs will talk with the underperforming ALJ. Labor has never filed charges against any ALJ, but there have been some very frank discussions. In most instances, these discussions bring about improvements in performance. Nevertheless, Labor's ALJ office must be careful about which cases it assigns to which judges.

Some chief ALJs work hard to stimulate greater productivity. They prepare monthly activity reports detailing judicial caseloads, the status of those loads (e.g., whether hearings have been held or scheduled), and the percentage of cases scheduled for hearing that were actually heard. Indeed, many SSA hearing offices began issuing these reports in face of increasing backlogs in the hope that they could stimulate more production. Other hearing offices do not have such reports because ALJs complain about interference with their decisional independence.

Perhaps neither a chief ALJ nor a non-ALJ manager can deal effectively with an ALJ who is intent on underperforming. Most chief ALJs suggested that they would have no difficulty taking action against an ALJ who engaged in some sort of flagrant misconduct (e.g., theft or sexual abuse), but doubted whether they could effectively deal with a simple case of underperformance. Presumably, non-ALJs would not find it easy to take action against an underperforming ALJ either. Recent Merit Systems Protection Board (MSPB) cases underscore the difficulty. In these cases, the MSPB overturned agency attempts to discipline ALJs. Some ALJs believe that these cases were poorly prepared and in fact probably should never have been brought.[101]

A few chief ALJs stated that they would take a fairly tough stance towards ALJ underperformance. One chief ALJ stated that, if he was concerned about an ALJ's performance, he would first talk to the judge. If there was a legitimate reason (personal or professional) for the underperformance, the chief would try to work with the judge. But, if the chief concluded that there was no legitimate reason and that the ALJ was simply a laggard, the chief would continue assigning cases to that judge and just let the backlog build up. If the ALJ failed to deal with

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Labor's Chief ALJ handles underproductivity differently in different cases. The Chief ALJ might be less concerned about underproductivity if the ALJ involved used to be productive, but is old and no longer able to be as productive as before. If the judge is not old, the Chief ALJ will sometimes "raise hell." The Chief might give this ALJ additional resources (e.g., clerks and support staff) to help the ALJ get caught up. Labor's Deputy Chief ALJ stated that he has only encountered one ALJ who was so bad that charges could have been filed against him.

[101] Some judges believe that the recent cases relied on a study which the agency could not prove was relevant to the specific case. Moreover, the agency did not do a good job of analyzing the particular ALJ's specific case loads. Some ALJs contend that, even in the Social Security area, quotas are inappropriate. Even when cases seem to be similar, there are always differences.

the backlog, the chief would ultimately recommend that disciplinary action be taken.

Whether chief ALJs can be forced to take a more active management role, when their offices are having problems, is debatable. Chief ALJs have job protections. Therefore, any agency will have difficulty exerting pressure on a chief ALJ—even if such pressure is appropriate. Moreover, at many agencies that use the chief ALJ system, that office functions relatively autonomously, with little agency oversight. For example, DOT's Assistant Secretary for Administration has little to do with the day-to-day functioning of the ALJ office. The Assistant Secretary is involved in budget issues and with broad administrative issues that cannot be handled by the chief ALJ. Thus, even if DOT's ALJ office had a problem with underperformance (something both the Chief ALJ and the Assistant Secretary suggested was not the case), the Assistant Secretary would expect the Chief ALJ to deal with the problem. Of course, if the ALJ office as a whole had a serious problem with underperformance, the Assistant Secretary might assume a more active management role.

D. The Desirability of Having Professional, Non-Judicial, Administrators

Would it be more efficient to have professional administrators managing ALJ offices rather than chief ALJs or non-ALJ judicial types? Professional administrators might more effectively perform many administrative and management functions now performed by chief ALJs. For example, they can handle many purely administrative matters such as budgeting, ordering supplies, etc. In addition, non-ALJs can supervise the support staff and make decisions about travel, leave, etc.

Professional administrators might help agencies achieve significant savings. They might be able to perform some tasks more effectively than chief ALJs (e.g., budgeting, purchasing, staff management) and might generate significant savings for their agencies. In addition, by allowing existing chief ALJs to spend more time hearing and deciding cases, professional administrators would allow existing chief ALJs to return to case production.

But the argument for a professional administrator is purely hypothetical. None of the agencies studied uses a professional administrator. Those agencies that do use non-ALJs typically have a judicial officer administer the ALJ office. USPS JO, EOIR's CAHO, and DOI's Director are all involved in the appellate process. These individuals are law-trained like their chief ALJ counterparts. They usually receive some training as administrators, but are no more likely to be better administrators than are chief ALJs.

Moreover, it is doubtful whether agencies would actually save money by replacing existing chief ALJs with non-ALJ administrators. Such savings might be possible in agencies that have large numbers of ALJs. But, in agencies that have a relatively small ALJ contingent (i.e., DOT, USDA, EPA), professional administrators may not have enough administrative work to occupy them full-time. If a chief ALJ does not have enough work, the chief can spend more time hearing and deciding cases. But, professional administrators cannot hear ALJ cases, and therefore may be unproductive.[102]

In hiring a non-ALJ manager, the agency will have an immediate increase in its costs. In order to free the chief ALJ up to decide more cases, the agency must add an additional person to the payroll—to perform the administrative functions that the chief ALJ previously performed. This administrator is likely to be quite well-paid. For example, DOI's Director is in the Senior Executive Service. As a result, agencies may spend a lot of money hiring administrators who, in the final analysis, will not have enough to do. Because hiring the administrator involves adding a person to the payroll, at significant cost, it will be difficult for the administrator to offset his salary through efficiency.

Professional administrators would appear to be cost effective in only two situations. The first is when the agency has a large number of ALJs (e.g., SSA) so that there is sufficient work to justify the additional hire. The second is when the administrator is responsible for more than just the ALJ office. For example, Interior's Director is responsible for the ALJs and the various review boards.

Even within SSA, the need for professional administrators is not particularly acute. SSA already has a fairly large administrative staff at national, regional and local levels. SSA has professional administrators who support its RCALJs and HOCALJs. As a result, RCALJs and HOCALJs are able to leave many administrative responsibilities to their office managers and to spend more time deciding cases. SSA could make more use of professional administrators by replacing RCALJs and HOCALJs with non-ALJs. But it may be desirable to have ALJs available to handle certain "judicial" problems that arise.

It is also important to note that, in order for agencies to achieve significant savings by replacing their chief ALJs, agencies would have to replace their chiefs with professional administrators. Whether agencies would be inclined to hire professional administrators to replace their ALJs is unlikely. Interior, which might benefit from having professional administrators, has not tended to put career administrators in the Director's position. On the contrary, it has used political appointees. The decision to use political appointees may be due, in part, to the fact that the Director is involved in the appellate process. Nevertheless, Interior's experience has not been entirely satisfactory.

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[102] For example, when FCC's Chief ALJ finds that a case needs to be handled quickly, or that a prompt ruling is required on a motion, he may handle the case or the motion himself.

In any event, non-ALJ administrators (of the non-judicial type) might be more objectionable than non-ALJ administrators of the judicial type. These administrators might be less likely to respect ALJ decisional independence because they do not understand the ALJ function as well, and do not understand the need for independence.

E. Conclusions

Agencies may administer their ALJ offices in many different ways. They can use a chief ALJ system, thereby providing the ALJ office with a relative degree of autonomy. Under this system, the chief ALJ actively administers the ALJ office. Alternatively, they can use non-ALJ administration which can take the form of a judicial administrator such as a Director, CAHO or JO or a non-judicial administrator who has no function in the appellate process. The latter type of administrator is hired merely to provide administrative expertise.

Although each administrative system has its strengths and weaknesses, it is generally preferable to have a chief ALJ in charge of an ALJ office. ALJs are given protections designed to ensure their independence, and the chief ALJ system is more consistent with this independent status. The chief ALJ will ultimately have to report to a non-ALJ, but the other ALJs are insulated from the non-ALJ administrator by virtue of the chief ALJ's presence.

Even though the chief ALJ administrative system is generally preferable, the preference for chief ALJs should not be regarded as absolute. Under the APA's present structure, it is inevitable that ALJs will report to non-ALJs at some point in the administrative structure. Moreover, there is little to suggest that non-ALJs are poor administrators, or that they attempt to interfere with or influence ALJ decisionmaking. Except for some explainable problems at DOI, the evidence is to the contrary. Nevertheless, to the extent possible, it is desirable to have ALJs administer ALJ offices.

In some instances, the inefficiencies that result from chief ALJ administration outweigh the benefits so that non-ALJ administrators would be preferable. One is when an agency has a relatively small number of ALJs (e.g. USPS & EOIR), thereby making it inefficient to have the office administered by an ALJ. Under these circumstances, an agency might legitimately choose to group its ALJs under a JO (or a CAHO or director) who administers the agency's entire judicial branch. The second situation is when an agency has ALJs spread around the country in small ALJ offices (e.g., DOI and EOIR). In this situation, it may be more efficient to have a non-ALJ judicial administrator. The efficiency of non-ALJ administration outweighs other considerations. It might also be possible to have a mini-corps especially for such judges.[103] But traditional chief ALJ management systems are inefficient.

To the extent that non-ALJs administer ALJ offices, agencies should avoid using political appointees. The experience at DOI, which has political appointees as Director of its Office of Hearings and Appeals, has not been positive. Other agencies that use non-ALJ administrators have "judicial type" personnel administer the ALJ office. This is a much more satisfactory solution.

In most instances where it is appropriate to have a chief ALJ, it is worthwhile to have the ALJ supported by a non-ALJ administrator who handles most of the administrative details. This administrator would be subordinate to the chief ALJ, and would relieve the chief of many administrative details including purchasing, management of support personnel, etc. A number of ALJ offices have already hired office managers to assist their chief ALJs. Even those chief ALJs who are not assisted by office managers generally have some subordinate who handles administrative details. These subordinates are not high grade officials with SES status,[104] but rather serve at GS levels.

SSA has the most elaborate support system. But office managers can be effectively used even at agencies with far fewer ALJs. For example, the FCC has only nine ALJs, but its Chief ALJ is assisted by an office manager who is responsible for statistical data, case tracking, personnel supervision, and serving as systems administrator for the word processing equipment. The Chief ALJ writes reports, especially substantive reports (e.g., reports discussing the efficacy of a rule, how the rule is utilized, and whether the rule should be retained or modified).[105]

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[103] Indeed, a mini-corps might provide the federal government with a chance to test the corps concept on a limited basis. *See* Jeffrey S. Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266 (1981).

[104] For example, DOT's Chief ALJ and the NRC's Chief ALJ are supported by office managers. The NRC is in a transitional phase due to a retirement.

Chief ALJs assign a variety of functions to office managers including management of the support staff, and the docketing of cases in the judicial office (after they are officially docketed by the NRC's docketing office). The Chief Judge retains responsibility for case assignment. DOL's Salt Lake City ALJ office has a legal assistant who handles docketing and tracking of cases. USDA's ALJ has a docket person who helps with budgeting.

Chief ALJs might place extensive reliance on other administrative personnel as well. For example, USDA's seeks help from USDA's finance people on budget preparation, and help from the agency's personnel office on personnel review matters.

[105] Some ALJs object to these management systems complaining that they (the ALJs) do not have sufficient control over support personnel. They feel that ALJs must have control over their support personnel in order to carry out their responsibilities, and complain that the current system pits administrators against judges. At SSA, HOMs are responsive to regional administrators, and in some instances to HOCALJs, but not to individual ALJs. The ALJs believe that they are competent to manage their own support personnel, and that the agency should not allow non-ALJs to conduct the reviews.

SSA ALJs have limited control over support personnel because they do not have rating authority over either the staff attorneys or the clericals. Rating responsibility is given to the supervisory staff attorney

Agencies that have office managers achieve many benefits. The office manager handles many administrative details, thereby freeing the chief ALJ from this responsibility, and allowing the chief to spend more time deciding cases. In addition, since the office manager is hired strictly as a manager, and does not have the conflicting role of judge, the manager can develop expertise in management. Thus, the ALJ office gets the benefit of managerial expertise within the framework of the chief ALJ system.

V. Decision Writers

Most of the agencies studied have individuals who assist ALJs in writing decisions. The job descriptions, titles and functions of these decision writers vary with each agency. At some agencies, they are referred to as staff attorneys or law clerks. At others, they are called technical assistants, legal assistants or paralegals. This section examines how agencies hire and use decision writers.

A. Staffing Levels

Agency staffing levels vary. The following chart demonstrates the variances.

Agency	# of ALJs	Decision Writers	Technical Assistants
SSA	850	925[106]	
EPA	7	2[107]	7
DOT	4	4	
DOI	4[108]	3[109]	
DOI Probate ALJs	8	0	2 per judge[110]
USPS	1[111]	0	
DOL	80	35-40	
FCC		0	9[112]
NRC	1	0[113]	
USDA	5	2[114]	

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and the HOM with the HOCALJ serving as the reviewing official. HOCALJs rate the HOMs and Supervisory Staff, and the review is done in the regional office

[106] SSA now has approximately 650 staff attorneys and 275 paralegal specialists.

[107] EPA's decision writers are staff attorneys. Since there are seven ALJs and only two staff attorneys, EPA attorneys are assigned to judges on a case-by-case basis. The ALJs would like to have a staff attorney for each ALJ, and have submitted a budget request seeking the additional attorneys

[108] The ALJs referred to here are DOI's ALJs who handle land cases

[109] DOI's Salt Lake City ALJs would like to have a third staff attorney - one for each judge. The ALJs believe that it would be cheaper for the agency to hire an additional law clerk than another ALJ The new attorney would write motions and decisions

[110] Each judge is given a paralegal and a clerical legal assistant

[111] USPS is in the process of hiring a second ALJ

[112] Technicians perform secretarial services and quasi-paralegal functions The office also has an administrative officer who handles personnel matters, records, statistics and general administrative matters.

[113] The agency used to have law clerks which it used extensively in reactor licensing and operating cases (which involved extremely large records) For example, the Seabrook case produced a record that ran into the hundreds of thousands of pages Since licensing and operating cases are on the wane, there is less need for law clerks now. Nevertheless, some of the judges would like to have law clerks to help them with research and other tasks, but the office is suffering through budgetary restrictions. The office does have some staff attorneys from which the judges can seek assistance.

B. Decision Writer Functions

Agencies also vary as to how they use their decision writers. Some agencies limit these personnel to decision writing. Other agencies give them greater, and sometimes lesser, responsibilities.

1. SSA

SSA's 925 staff attorneys and paralegal specialists are used primarily as decision writers. They read and evaluate hearing transcripts, and prepare the initial drafts of decisions. They also do legal research as necessary.

SSA has experimented with the idea of giving staff attorneys more substantial responsibilities. Recently, SSA concluded a pilot program that allowed supervisory attorneys and some senior staff attorneys to handle prehearing conferences.[115] This program, which began in March 1992 and was used in 19 hearing offices, ended in September 1992. At the time of the interview, SSA was in the process of reviewing the program and drawing conclusions about its effectiveness.

2. EPA

EPA has two staff attorneys who do research and draft orders of a substantive nature. They also draft a few decisions for ALJ review. The staff attorneys are not assigned to individual judges, but rather work with all judges on a case-by-case basis.

EPA also has seven legal staff assistants who are assigned to individual judges on a full-time basis. These assistants, who are not attorneys, perform a myriad of functions. They answer routine questions from lawyers, and they assume some secretarial duties. Assistants do not write legal decisions, although they are sometimes asked to prepare routine orders for a judge's signature (e.g., they monitor cases and prepare show cause orders for the judge's signature in cases where the parties are delinquent).

3. DOT

DOT has four attorney-advisors who provide support to its ALJs. They do research and draft decisions for the ALJs, and they perform other functions.[116]

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[114] At the time of the interview, one of the positions was unfilled. However, USDA had advertised for a replacement. The office would like to hire a third law clerk.

[115] In fact, this pilot program was the second of two programs. SSA was unable to draw statistically valid conclusions from the initial study and decided to conduct the second pilot.

[116] The Office of Hearings describes the function of its attorney-advisors as follows:

> The major responsibilities of the Attorney-Advisors are assisting the Judges in analyzing substantive and procedural issues in hearing cases; receiving records and

4. DOI

DOI's ALJs who handle land cases use their law clerks in different ways. The Salt Lake City ALJ office has two staff attorneys who do research and draft decisions for the ALJs. At the time of the interview, one of the Salt Lake City ALJs had been assigned to work on probate cases, and one of the law clerks had been assigned to work with him on those cases.[117] The Knoxville ALJ is supported by a staff attorney and by a secretary who does docket work.

The ALJs who handle probate ask their paralegals to prepare the initial drafts of simple decisions, thereby allowing the ALJs to focus on more complicated issues.

5. FCC

At the FCC, the judges each have a technical assistant assigned to them.[118] The technicals are not attorneys and generally do not engage in decision writing. However, they are sometimes asked to prepare short orders in routine matters (e.g., requests for extensions of time) for a judge's signature.

6. USDA

USDA asks its law clerks to perform a variety of functions including research, decision writing, etc. However, unlike SSA's ALJs, most USDA ALJs draft their own decisions.

C. Other Comparisons

Agencies differ in other respects regarding their use of decision writers. This section offers some insight into those variations.

> organizing materials filed by parties; doing legal research and organizing materials filed by parties; doing legal research and obtaining needed court decisions, statutes and regulations; assist in drafting notices, orders and initial or recommended decisions; reviewing notices, orders and decisions prior to their issuance to assist in eliminating inaccuracies, errors or deficiencies; ensuring that notices, orders and decisions are properly served; serving as clerk of court for the Judges in such matters as responding to telephone inquiries by the parties or the public with respect to status or procedural aspects of a proceeding; attending prehearing conferences and hearings, and assisting in related matters.

Spina Fax, *supra* note 23, at 2.

[117] The ALJs decided to allocate one of the law clerks to the ALJ handling probate cases because such cases are time intensive.

[118] In the early 1980s, the office had three law clerks who worked on major market cellular cases. These law clerks assisted in the hearing of cases and the preparation of decisions.

1. Pools v. Clerks

One way in which agencies differ is in how they organize their decision writers. Some decision writers serve as law clerks assigned to a particular judge, while others are organized into staff attorney pools. SSA's Louisville office uses the latter approach. Decision writers work for different ALJs depending on the case to which they are assigned. The HOCALJ assumes ultimate responsibility for staff attorney performance, but delegates day-to-day management authority to a supervisory attorney.[119] USDA has five judges and two law clerks, and its clerks are not assigned to particular judges either.

Some agencies do not organize their decision writers into staff attorney pools. Rather, they treat their decision writers as law clerks under a system like that used by the federal judiciary. EOIR, for example, allows each judge to hire a clerk who works for and with that judge. The same is true at the Department of Labor. Labor has a shortage of clerks (80 ALJs but only 35-40 law clerks) due to budget restrictions, but does not pool its clerks. They are assigned to work with individual judges.

2. Permanent v. Fixed-Term

Agencies also vary in how they hire decision writers—on a fixed-term or a permanent basis. SSA hires its decision writers on a permanent basis. If the decision writers do a good job, they can stay until they retire or decide to change jobs. Some staff attorneys do, in fact, remain with SSA for very long periods (e.g., ten to fifteen years). EOIR, DOI and DOL tend to hire their decision writers on a short-term basis. Labor's clerks cannot remain more than two years. DOL does have five permanent staff attorneys. The following chart illustrates how agencies hire their clerks.

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[119] The ratio of ALJs to opinion writers varies somewhat from agency-to-agency. At the time of the interview, Louisville's SSA office had seven ALJs and eight opinion writers. However, the office was expecting to receive an eighth ALJ.

AgencyOffice	Position	Appointment
DOI Salt Lake City ALJ Office	Attorney	2 years
DOI Knoxville ALJ Office	Staff Attorney	2 years
DOI ALJs (probate cases)	Paralegal Spec	Permanent
SSA Hearing Offices	Staff Attorney	Permanent
SSA Hearing Offices	Paralegals	Permanent
EPA ALJ Office	Staff Attorney	Permanent[120]
DOL ALJ Office	Law Clerk	2 years
DOL ALJ Office	Staff Attorneys	Temporary[121]
EOIR ALJ Office	Law Clerk	1-2 years
DOT ALJ Office	Legal Assistants	Permanent & Temp.[122]
USDA ALJ Office	Law Clerks	1-2 years[123]
Commerce ALJ Office	Staff Atty\ Law Clerk[124]	Temporary
FCC ALJ Office	Technicals	Permanent

3. Pay Levels

Decision writers pay levels vary considerably from agency to agency. The following chart illustrates the differences:

Agency Office	Position	Grade Level
SSA ALJ Offices	Staff Attorney	GS-11 - GS-12
ALJ Offices	Paralegal Specialist	GS-9 to GS-12[125]
DOL ALJ Office	Law Clerk	GS-11
DOL ALJ Office	Staff Attorneys	GS-13 to GS-15
DOI ALJ Offices	Staff Attorney	GS-9 & 11[126]
DOI IP ALJ Office	Legal Assistants	GS-9 & 6
EPA ALJ Office	Staff Attorney	GS-12 & 13
DOT ALJ Office	Legal Assistants	GS-11 & 14[127]
USDA ALJ Office	Law Clerk	GS-11 & 12
FCC ALJ Office	Technical Assistant	GS-8 & 9
Commerce ALJ Office	Staff Attorney\Law Clerk	GS-5 to GS-12

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[120] However, few clerks stay more than two to four years.

[121] However, unlike the law clerks who must leave after two years, the staff attorneys can remain for long periods (albeit on short-term contracts). After the first year, staff attorneys are eligible for a variety of benefits including pension benefits.

[122] DOT prefers to hire temporary legal assistants. However, two of its present assistants were hired by the Civil Aeronautics Board (CAB) on a permanent basis. Since the CAB's ALJs provided the nucleus for DOT's Office of Hearings, the legal assistants were kept on a permanent basis when the ALJs and assistants transferred to DOT.

[123] The office gives clerks an initial one-year appointment that can be renewed for a second year. Further renewals are possible, but are granted only when the ALJs are very happy with a clerk's performance.

[124] The staff attorneys usually begin as GS-5 law clerks during law school. Once they graduate and pass the bar, they become staff attorneys and must leave within a year.

[125] In order to qualify for a GS-12, the paralegal must be certified.

[126] The ALJs are trying to arrange for their most senior staff attorneys to be promoted to the GS-12 level. However, at the moment, the promotion is not permitted because the attorneys are temporary employees.

[127] DOT's two permanent assistants serve at the GS-14 level while its temporary assistants serve at the GS-11 level.

4. Attorneys v. Nonattorneys

Most agencies tend to hire attorney decision writers. Included are EPA, USDA and DOL. Several agencies hire significant numbers of nonattorneys. DOI hires legal assistants to support its IP ALJs, the FCC hires technical assistants, and SSA hires paralegals.

SSA provides the most interesting example. SSA's hearing offices have hired a large number of paralegals over the years, and are now hiring more. The paralegals often start as clericals in other SSA offices. SSA hopes to hire paralegals who have graduated from junior college or college, but some supervisory attorneys complain that many hold only high school diplomas. Paralegals perform many of the same functions as staff attorneys. In general, both analyze hearing records and draft decisions for ALJs.

In recent years, SSA has hired far more staff attorneys rather than paralegals. As a result, some hearing offices are staffed completely by staff attorneys, and the remaining offices generally have far more staff attorneys than paralegals. However, OPM recently reviewed the decision writer position and concluded that it could not justify hiring attorneys merely to write decisions. SSA is now required to identify those functions for which an attorney is essential, and those that can be performed by either a paralegal or an attorney. SSA must then evaluate each hearing office to determine how many staff attorneys can be justified for each office. To the extent that an office has too many staff attorneys, SSA will achieve balance through attrition and restrictions on future hirings.

These restrictions are already beginning to have an impact. At the date of the interview, SSA had about 200 paralegals compared to 650 or so staff attorneys. Six months later, the agency had 275 paralegals and roughly the same number of staff attorneys. SSA's Acting Chief ALJ anticipates that hearing offices will hire many more paralegals in the future.[128]

5. Management of Decision Writers

Decision writers are managed in different ways in different agencies. At most agencies, decision writers are reviewed by the judges for which they work. This is true at DOL[129] and DOT. There are, however, some variations. At SSA, staff attorneys and paralegals are managed and evaluated by GS-13 supervisory staff attorneys. The HOCALJ serves as the reviewing official. Supervisory attorneys are evaluated by the HOCALJ, and the RCALJ serves as the reviewing official. USDA's law clerks generally remain for such short periods that they are not reviewed. However, to the extent that review is required, the Chief ALJ conducts it.

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[128] From the time of the initial interview until the study's completion, SSA increased its paralegal staff by 75 (from 200 to 275). SSA expects to continue hiring paralegals rather than attorneys.

[129] ALJs review their own clerks. The Chief ALJ serves as the reviewing official. The Chief ALJ does performance evaluations for the administrative officer and legal technician.

D. Advantages and Disadvantages of the Various Systems

Is one decision writer system preferable to another? There is no simple answer. Each system has its own strengths and weaknesses.

1. Pools v. Clerks

Those agencies that have adopted the pool system have generally done so for reasons of efficiency. Louisville's SSA office uses the pool system because decision writers differ in terms of their expertise, proficiency, and productivity. The pool system allows the office to assign more complex cases to more able decision writers while assigning less complex cases to less able writers. In addition, the system ensures that an individual ALJ's productivity will not suffer merely because the ALJ has a new or less able clerk.

Agencies that assign decision writers to particular judges use that system for a variety of reasons. In many instances, the judges prefer to personally train their clerks. From the decision writer's perspective, the clerk system also has advantages. It allows the writer to learn the judge's idiosyncracies and preferences, and to more effectively carry out the judge's will. Of course, if there is a bad fit between the clerk and the judge, the clerk system can create problems.

Interestingly, whether decision writers are organized into pools or are assigned to individual ALJs, most ALJs seem relatively content with the system used in their offices. Few ALJs expressed concerns about their own system, or a preference for the opposite system. Few decision writers complained either.[130] Indeed, the only complaints received came from some SSA ALJs who were concerned about the fact that they do not manage SSA staff attorneys.[131]

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[130] DOL clerks like being assigned to a particular judge because they prefer to have a personal connection with a judge. Only a few clerks have had trouble getting along with their judges. When that has happened, the clerks have been reassigned to another judge.

[131] *Bono Letter*, *supra* note 70, at 8:

> The Staff Attorney program has been mismanaged for many years by agency administrators. The office configurations that removed the attorneys from direct supervision and control of the individual judges has created inefficiency, alienation and consequent demoralization. The Staff Attorneys should be placed in apprenticeship positions assigned to an individual judge and utilized in all areas of their job descriptions. If this means the agency has to hire more lawyers, then that should be done. I do not see the solution in an expansion of paralegals for decision writing, as many judges are reluctant to accept decision writers who are not legally trained.

2. Fixed-Term v. Permanent

Whether decision writers should be hired on a fixed-term or a permanent basis presents a more vexing problem. Many ALJs expressed very strong feelings on this issue. With some exceptions, ALJs who have temporary law clerks seem to prefer that approach. Many of these ALJs do not want permanent clerks. ALJs who have permanent staff attorneys/law clerks have very mixed views on the subject. Some SSA ALJs expressed a preference for temporary staff attorneys rather than the permanent staff they currently have.

On the surface, it would seem that agencies would benefit from hiring permanent rather than temporary clerks. DOI's Salt Lake City office provides a good example. That office has hired clerks on a two-year basis, but the ALJs would prefer to make permanent appointments.[132] The ALJs complain that new clerks must go through a training period during which they learn a variety of things (e.g., DOI's regulatory scheme, as well as how to write decisions). In addition, law clerks must adapt to the judges with which they work. Once trained, clerks are available to DOI for only a short period of time. During the latter part of their terms, when the clerks are fully trained, they must aggressively seek employment elsewhere thereby diminishing their effectiveness. Once the clerks leave, the training process begins all over again. DOI's ALJs view the system as inefficient and would like to hire their clerks on a more permanent basis.

Some within SSA agree that permanent staff attorneys are preferable. One SSA supervisory attorney argues that it would be a disaster for SSA to hire short-term decision writers. He claims that it takes about a year to train a new staff attorney to handle cases of moderate complexity. If staff attorneys were hired on a temporary basis, and the office faced a constant turnover of staff attorneys, office productivity would decline. This supervisory attorney, who generally prefers to hire staff attorneys rather than paralegals, would prefer to have permanent paralegals than temporary staff attorneys.

But most ALJs who hire short-term clerks discount the inefficiencies. They recognize that short-term clerks must go through a training period, but argue that it does not take all that long to train a new clerk. In addition, agencies that hire large numbers of temporary clerks (e.g., DOL) have established training programs that help ease the transition. Some of these agencies have law school intern programs that allow students to learn about their regulatory schemes, and that allow the agency to "try out" prospective clerks.

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[132] But OHA's Directors have been unwilling to approve permanent appointments.

DOL provides an interesting example of an agency that hires short-term clerks.[133] DOL's ALJs claim that they are able to hire highly-qualified individuals for two year appointments. DOL hires recent graduates, and requires clerks to commit themselves to the job for at least a year, but forces them to leave by the end of the second year. DOL has a week-long training program that begins in August or September. It involves training tapes, as well as lectures by older clerks and by ALJs. Lecturers use decisions illustrating the work, and explain to new clerks what they will be expected to do and why. Lecturers try to inform clerks about what the regulations require, and what they ought to be looking for when they review records.[134] DOL is very satisfied with its program.

DOL's program has some obvious inefficiencies. Every summer DOL has to run a training program during which it gets no productivity from its new clerks (as well as reduced productivity from those who train the new clerks). Once the training session ends, DOL has decision writers who are not yet proficient and must spend the next several months learning their job.[135] Moreover, since DOL's clerks can only stay two years, they usually begin looking for a job after their first year. By the end of 18 months, they can spend a significant amount of time looking for a new job. The problem is compounded by the fact that, historically, DOL clerks have left after 18 to 20 months. DOL then must choose between leaving a clerk position vacant until the next summer and hiring a new clerk in mid-year when there is no training program. This problem is mitigated somewhat by the current recession which has made it more difficult for clerks to find jobs, and has meant that more clerks stay until nearer the end of the two-year period. But the recession has a downside as well. Some clerks believe that it is a bit harsh to make them leave after two years.

Even though short-term law clerk/staff attorneys have their disadvantages, permanent decision writers can involve equally serious, if not more serious, drawbacks.[136] SSA staff attorneys suffer from a high level of dissatisfaction.

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[133] DOL has approximately 35-40 law clerks who are assigned to work with individual judges. One DOL's Deputy Chief ALJ stated that clerking provides a wonderful experience for recent law school graduates, but he also stated no one should clerk for more than a year or two. The Deputy does not believe that clerks learn much after that point, or that they continue developing as lawyers. In addition, he thinks that it is good for ALJs to have short-term clerks. It forces them to become teachers. The Deputy Chief downplayed the importance of expertise.

[134] Over time, the program has evolved. At first, it was too intensive. Now, DOL tries to provide clerks with an introduction to the major substantive areas and introduce them to opinion writing, but to do so with the expectation that the clerk cannot learn everything in the training session. Some on-the-job training is necessary. One ALJ believes that a new clerk's learning curve is about three months.

[135] Some DOL law clerks stated that, in the beginning, they relied heavily on clerks who had been there a year or so. When those clerks left, the new clerks felt that they had lost a valuable resource. DOL does have a few permanent attorneys, but they are assigned to particular projects and are not always available to help the clerks. The clerks would like to have more permanent attorneys available.

[136] Permanent decision writers must also go through a learning curve, but they remain with their agencies longer thereby requiring fewer hires. For example, SSA hearing offices have permanent decision

This dissatisfaction is due to two major factors. First, SSA work is fairly repetitive. This is particularly true of disability cases. For the first one to three years, decision writers get increasingly complex cases, and can be both stimulated and challenged by their jobs. But, as the years pass, the job becomes repetitive, and the repetitiveness takes its toll. After ten or fifteen years, the work can become numbing.

The repetitiveness is compounded by the fact that staff attorneys have few promotional or career options. Staff attorney decision writers are caught in deadend jobs. A few staff attorneys get promoted to supervisory positions, but the number of such positions is limited. Virtually all decision writers would like to become ALJs. But, in most instances, they have little hope of doing so because they lack sufficient qualifying experience. As a result, most staff attorneys stay in their positions for very long periods of time. They do so because they receive decent pay (most are GS-12s),[137] benefits and annual leave in a low stress environment,[138] as well as because many believe that they do not have highly-marketable skills that allow them to earn as much outside SSA.[139]

This situation, in which decision writers are bored and lack sufficient promotional opportunities, creates a deadly environment. Many staff attorneys are confronted daily by the difference in status between themselves and ALJs.[140] Some staff attorneys, as they develop expertise in the SS area, become increasingly angry. They are frustrated by the deadend nature of the job and their inability to become ALJs, and they compare themselves to the ALJs in their offices. Some staff attorneys believe that they compare favorably to some of those ALJs. For example, one decision writer openly stated that some of the judges in his office were not fit to "carry his briefcase." These comparisons tend to fuel staff attorney anger and frustration about their inability to gain promotion, and to create morale problems within hearing offices.

This situation has an undeniable effect on staff attorney morale and productivity. SSA hearing offices have a huge case backlog.[141] Some staff

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writers with a great deal of experience (e.g., ten to 15 years). In some respects, this longevity is a plus. Staff attorneys develop a high level of expertise, and hopefully they get better and more productive over time.

[137] Staff attorneys with no experience enter at the GS-9 level. After one year, they can qualify for promotion to the GS-11 level. A year later, they can qualify for a GS-12.

[138] Experienced staff attorneys claim that they find the job relatively easy once they become accustomed to it. In addition, they are able to keep regular hours.

[139] Some ALJs believe that staff attorneys could make a good income on the outside if they were willing to establish their own SSA practices. But this prospect is daunting to some staff attorneys because it involves significant startup costs as well as other uncertainties.

[140] The problem was aggravated when the ALJs were upgraded from the GS-15 level to the ALJ scale. Staff attorneys remained at the GS-12 level.

[141] At the date of the interview, SSA's Louisville office had 900 cases that had not been heard, and there were 100 cases backed-up in typing. At one point, there were 200 opinions waiting to be typed.

attorneys do only a minimal amount of work—the amount they have to do to avoid recriminations. This problem was underscored by a supervisory attorney's response to a question about whether his decision writers have personal computers at their disposal. The supervisor stated that OHA has budgeted for computers and that they would arrive soon. But the supervisor also stated that computers would have little effect on productivity. The most experienced decision writers, the ones who could benefit the most from computers, would probably not produce any more decisions. They suffer, not from a lack of equipment and resources, but from a lack of will. This morale problem affects not only the dissatisfied staff attorneys, but also other staff attorneys who work with the dissatisfied attorneys on a daily basis.

SSA's staff attorney problem may be unique to it. Other agencies who hire permanent staff attorneys do not have SSA's problems. EPA's ALJ office hires its staff attorneys on a permanent basis, but they do not suffer the same morale problems as SSA's staff attorneys. The morale difference may be attributable to two factors. First, EPA's caseload is more varied and more interesting than SSA's. Second, EPA staff attorneys are more marketable. If EPA staff attorneys become dissatisfied with their jobs, they can obtain other positions within EPA or in the private sector.[142]

Other agencies that also have repetitive work tend to hire their clerks on a temporary basis. For example, some DOL cases, particularly Black Lung cases, can get a bit repetitive.[143] But DOL clerks remain with DOL for only a short period of time and therefore do not have time to develop the severe morale problems developed by SSA staff attorneys.

Do agencies that hire permanent clerks have an advantage in terms of recruitment? One might suspect that they do. Prospective decision writers may be more interested in permanent positions even if they do not intend to remain permanently. The permanency relieves them of the pressure of finding another job in the near future. But, interestingly enough, none of the agencies surveyed encountered any difficulties recruiting high-quality personnel. For example, EOIR hires short-term clerks, but is able to recruit them from the Justice Department's Honors Program. Of course, since EOIR hires recent graduates, it gets decision writers with less experience who may suffer through a longer learning curve.

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[142] EPA's Chief ALJ stated that EPA attorneys with experience have no difficulty finding jobs in the private sector. Congress is always rewriting the environmental statutes, and the agency is always producing new or revised regulations. As a result, experienced environmental attorneys are in demand.

[143] One clerk stated that it took her about a month to feel comfortable doing Black Lung cases. She still sees some new wrinkles, but the cases have become somewhat repetitive. Clerks who handle traditional cases complained that, even with substantial experience, they still find some cases difficult. Traditional cases involve a range of subject areas, and it is difficult to learn all the areas in a short period of time.

Even SSA has generally been able to recruit high-quality individuals. Some SSA staff attorneys ranked fairly high in their law school classes, and also have large law firm experience. Whether SSA will continue to be able to recruit quality individuals once economic conditions change is unclear. Many current staff attorneys were attracted to the position by the hope that they would eventually become ALJs. Since it is now clear that staff attorneys have little chance of doing so, SSA may have more difficulty recruiting top-flight individuals in the future. SSA may only be able to recruit individuals who are attracted by decent pay and a low-stress environment who are willing to accept the boredom and repetitiveness of the job as a tradeoff.

3. Pay Levels

As noted earlier, pay levels vary significantly from agency to agency. Some support staff serve at the GS-11 level. Others serve at the GS-14 or GS-15 level. It is difficult to draw conclusions about the appropriateness of these pay differentials. Staff attorneys/law clerks vary significantly regarding their experience and responsibilities, and some agencies have more complex work than others.

Some comparisons are, however, noteworthy. SSA's Appeals Council (AC) uses primarily nonattorneys (analysts) as decision writers. By contrast, SSA's hearing offices use primarily staff attorneys. Both AC analysts and hearing office staff attorneys work on the same types of cases. Nevertheless, AC analysts are generally paid more than hearing office staff attorneys. Hearing office staff attorneys generally serve at the GS-12 level after they have been with SSA for a couple of years. AC analysts typically serve at GS-12 and GS-13 levels.

But the situation within SSA is under audit both with regard to hearing office staff attorneys and AC analysts. Whether AC analysts will continue to be eligible for promotion to the GS-13 level is unclear. Moreover, SSA hearing offices will be required to hire more paralegals in the future.

4. Attorneys v. Nonattorneys

Whether it is preferable to hire attorneys or nonattorney decision writers depends on the agency, and the type of work that its ALJs handle. In some instances, the work is sufficiently complex that attorneys are necessary. In other instances, attorneys are not necessary. For example, DOI's ALJs who handle probate cases tend to hire paralegals. In addition, as noted earlier, SSA's AC has hired significant numbers of paralegals.

5. Management of Decision Writers

Whether one management system is preferable to another is debatable. Some SSA ALJs complain that they lack supervisory authority over the staff attorneys in their offices. These ALJs believe that they need to retain management control to ensure that their work is completed in a timely and quality fashion. These claims are difficult to evaluate. There is little question but that SSA has severe problems with its staff attorneys, but it is doubtful whether these problems are due to SSA's management system. As suggested earlier, there are many other reasons for staff attorney discontent.

E. Conclusions

Several recommendations can be offered regarding agency use of decision writers.

1. SSA is in Desperate Need of Change

Most agencies appear to be having no problems with their decision writers. SSA, on the other hand, is having major problems. As noted, SSA decision writers suffer from low morale that significantly affects their productivity.[144] These problems result from a combination of many factors: SSA hires attorneys, it does so on a permanent basis, the work is repetitive, and staff attorneys have limited career options.

There are several ways SSA might deal with its staff attorney problem. One solution is to stop hiring staff attorney decision writers. Because of OPM's recent audit, SSA will have no choice but to hire more paralegals in the future. Indeed, during a recent six month period, SSA hired an additional 75 paralegals. Many SSA ALJs and supervisory attorneys oppose the idea of hiring more paralegals. One supervisory staff attorney believes that paralegals do not perform as effectively as attorneys. Others agree. ALJs fear that their own productivity will suffer, and supervisory attorneys worry about the overall impact on productivity. One supervisory attorney noted that SSA has a backlog of more than 200,000 cases (the backlog is, in fact, much higher[145]), and that the backlog is rising rather than falling. If paralegals write fewer decisions than staff attorneys, the backlog may get worse. ALJs also worry about whether paralegals can handle the most complex cases, and whether the addition of more paralegals will further demoralize SSA's staff attorneys. These supervisors point to the fact that paralegals are eligible for promotion to GS-12, the same level available to hearing staff attorneys who are already frustrated about their lack of promotional opportunities.

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[144] Although most SSA ALJs and staff attorneys agreed with this assessment, there was some disagreement:

> While I would agree that there is a degree of demoralization, I cannot accept the premise that the Staff Attorneys are underperforming in productivity of drafted decisions, or that their demoralization is so significant that it is the cause for the backlog of cases. Your paper and the conclusion of underproductivity ignores the increasing complexity of drafting decisions that will be acceptable in the appellate courts since the Disability Reform Legislation of 1984.

Bono Letter, *supra* note 70, at 8.

But a fairly strong argument can be made for using more paralegals. The AC hires large numbers of nonattorneys to review decisions written by hearing office staff attorneys, and to prepare drafts of decisions for the AC. The AC has been able to recruit high quality nonattorneys, and they have performed effectively without serious morale problems.[146] To the extent that SSA hearing offices also hire nonattorneys, they might solve many of their morale problems. Nonattorneys cannot aspire to the ALJ position, and therefore might not be as frustrated by the lack of promotional opportunities. Of course, nonattorneys will still have to deal with the repetitive nature of the job, but nonattorneys may more easily cope with this problem than attorneys since they cannot aspire to become ALJs.

One caveat regarding the use of nonattorneys is in order. Some SSA ALJs and supervisory staff attorneys are concerned that unlike the SSA's Appeals Council (AC), hearing offices may not be able to attract high quality individuals as decision writers.[147] They contend that SSA might, instead, use the decision writing position as a promotional opportunity for clericals. In other words, hearing offices would not get the higher-quality managerial types that the AC now recruits. If this happens, then hearing office productivity may, in fact, suffer.

A second option is for SSA to continue hiring staff attorney decision writers, but to hire them on a fixed-term basis. Other agencies have successfully used this approach. Under this arrangement, SSA would try to recruit bright young law school graduates with the expectation that they will leave within a year or two.

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[145] SSA's Chief ALJ stated that OHA had a backlog of 220,000 cases at the end of FY 1992, and its backlog is now more than 338,000.

[146] Although AC analysts have some morale problems, their morale seems to be much higher than that of SSA staff attorneys. This is true even though analysts are also hired on a permanent basis, remain with the AC for long periods (some analysts have been with the AC for 20 years), and handle the same type of cases as hearing office staff attorneys. Nevertheless, because most analysts are not attorneys, and cannot aspire to become ALJs or AAJs, they do not seem to be as frustrated as SSA staff attorneys. Nevertheless, AC analysts have some morale problems due to the repetitive nature of the work and case production pressures.

[147] For a discussion of the Appeals Council's analyst position, *see infra* discussion accompanying notes 186-195.

This proposal is supported by some SSA ALJs. One ALJ argues that because ALJs know that they can rely on staff attorneys, some ALJs tend to become lazy and do not learn SSA's rules and regulations well enough or keep up with new developments. This ALJ believes that, if staff attorneys were hired on a short term basis, ALJs would be forced to be more responsible.

Many SSA ALJs and supervisory attorneys believe that it would be undesirable to hire staff attorneys on a short-term basis. Indeed, some argue that it would be disastrous and inefficient. SSA would lose the expertise of those that have already been trained. In addition, SSA would have to constantly train new decision writers. One supervisory staff attorney claims that it takes a year or more to train a new staff attorney to work independently on cases of moderate complexity. If attorneys were hired on a short-term basis, so that the agency faced a constant turnover of personnel, the agency's productivity and work product would be affected. This supervisory attorney stated that he would prefer to hire paralegals on a permanent basis rather than staff attorneys who left after two years. Nevertheless, if SSA did hire staff attorneys on a short term basis, it would eliminate a major source of discontent that seriously affects productivity. Moreover, those agencies that hire temporary clerks discount the problems and are relatively satisfied with the system.

SSA's problems could also be solved by providing staff attorneys with opportunities for career advancement. If staff attorneys had career possibilities that give them hope, and that encourage them to continue working hard, SSA might get improved productivity from its staff attorneys. SSA has developed a partial career ladder for staff attorneys that allows them to be promoted to GS-13 supervisory staff attorney position. However, there are problems with the supervisory attorney position. Even though most supervisory attorneys are relatively content with their jobs, they too are concerned about their inability to gain promotion to ALJ. Moreover, few staff attorneys are able to gain promotion to the supervisory position. There is only one such position per office, and supervisory attorneys rarely resign or become ALJs. Instead, they remain in their positions for very long periods thereby reducing the promotional opportunities of other staff attorneys.[148] To obtain a supervisory position, staff attorneys are often forced to compete for available positions in other cities. Some staff attorneys, especially those with families, find this option unacceptable.

At present, OHA is thinking about the possibility of developing other career opportunities for staff attorneys. OHA has recently experimented with using staff attorneys to handle alternative dispute resolution proceedings. In a pilot program, OHA allowed staff attorneys to conduct prehearing conferences. OHA hoped that these conferences would result in more settlements, would streamline the issues in cases that did not settle, and identify cases that can be decided without a hearing. OHA is in the process of evaluating the pilot program to see whether it should be made permanent.

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[148] Many of the GS-13s are relatively young.

SSA is also considering other possibilities. The Associate Commissioner for Hearings and Appeals has considered allowing staff attorneys to hear and decide Medicare Part B cases (which involve amounts of < $5,000.).[149] If this happens, staff attorneys would be able to gain additional experience, thereby giving them a better chance to qualify for ALJ positions. They would also have more interesting work, and promotional potential to a GS-13 or GS-14. However, this program may require statutory authorization.

Staff attorneys have a number of suggestions about how they might be given additional responsibilities. Some staff attorneys believe that they should be used to defend federal court challenges to SSA decisions.[150] They also suggest that SSA could use staff attorneys at the reconsideration level.

Of course, many staff attorneys would like to be promoted to ALJ. But, historically, staff attorneys have not fared well in the ALJ selection process.[151]

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[149] The Staff Attorney Magistrate program was described as follows:

> the agency will establish a senior staff attorney position with magistrate-type hearing authorities to hear and decide cases which at present are heard by an ALJ; these will initially be Medicare Part B cases involving less than $5,000. Later, the plan is to include Titles II and XVI disability cases as well as Part A cases.

Association of ALJs Newsletter, at 6 (Aug. 3, 1993). The Association of ALJs opposes the program:

> The Association is quite concerned about the potential for non-APA hearings by staff attorney magistrates.... While we wish to work with staff attorneys to use their talents more widely and provide broader, more rewarding experience for them, our position is that such a program is subject to much abuse unless sufficient supervisory controls are implemented as well. Such procedures would involve, for example, assignment to the ALJ in the first instance, and management of the case by the staff attorney with the ALJ's advice and approval. One wonders whether the agency is not simply trying to end-run the merit selection system required by hiring through the register supervised by OPM?

Id.

[150] SSA decisions are currently defended by U.S. Attorney offices. Some staff attorneys contend that U.S. Attorney's offices are not particularly interested in SSA work. Some SSA staff attorneys have applied for U.S. Attorney positions, especially positions involving SSA cases, but SSA attorneys rarely get the job. They are disadvantaged by their grade level, vis-à-vis recent graduates who can be hired for much less, as well as by their lack of litigation experience.

[151] A 1988 GAO report summarized the situation as follows:

> Of 23 SSA staff attorneys in grades GS-11, GS-12, and GM-13 who applied for ALJ positions in the 1984 competition, OPM placed eight on ALJ-qualified registers as of July 1988. All of the SSA staff attorney applicants were employed by SSA's Office of Hearings and Appeals. Two were appointed to GS-15 ALJ positions at SSA. Both were male ten-point veterans.

OPM has generally preferred ALJ applicants who have a range of litigation experience—obtained either as a judge or as a litigator.[152] Many staff attorneys join SSA relatively early in their career and never obtain sufficient judicial or litigation experience.[153] Only a few staff attorneys, generally those who are eligible for the veterans preference, succeed in becoming ALJs.[154]

SSA staff attorneys quarrel with SSA's selection criteria. They recognize that they lack litigation experience, but argue that they compensate for that deficiency by their knowledge of SSA's regulatory scheme. They argue that this knowledge is devalued in the selection process, and that SSA hearings are relatively informal so that litigation experience is less essential. Staff attorneys also argue that they have a good deal of experience in synthesizing and analyzing facts, essential skills for an ALJ, because of their staff attorney experience. Finally, they argue that OPM's current criteria do not result in the selection of quality judges so that some changes are needed.

It is difficult to quarrel with OPM's selection criteria, which gives preference to those with litigation and judicial experience. ALJs are asked to do a variety of things only one of which involves decision writing. Granted, SSA staff attorneys have extensive knowledge of SSA rules and regulations, but this

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Administrative Law Judges: Appointment of Women and Social Security Administration Staff Attorneys, GAO Report to Hon. Sander M. Levin, House of Representatives, at 2-3, GAO/GGD-89-5 (October, 1988)("GAO Report").

[152] A GAO report noted that:

> OPM data show that few OHA staff attorneys who applied in 1984 have successfully competed for available ALJ positions. The appointment and examination experience, as of July 1988, of 23 OHA staff attorneys (including supervisory staff attorneys) who applied for ALJ positions during the 1984 open period (19 males and four females) was as follows:
>
> -Two staff attorneys were appointed to GS-15 ALJ positions in SSA; both were male and 10-point veterans in grade GS-12 with final examination ratings, adjusted for veterans' preference, of 98.43 and 90.52.
>
> -Six other staff attorneys (five males and one female) completed the entire examination and were placed on OPM registers with final ratings, adjusted for veterans' preference, ranging from 90.52 to 80.92, but were not appointed. These applicants were all veterans, four in grade GM-13 and two in grade GS-12.
>
> -Of the remaining 15 staff attorneys or supervisory staff attorneys who were not appointed, one male had not yet completed the entire examination, 11 (eight males and three females) had projected maximum ratings of 85.24 or below based on their scores from the first part of the examination and thus were not asked to complete the remaining parts of the examination, and three other male applicants were considered by the ALJ Office not to meet minimum qualification requirements.

Id., at 7-8.

[153] For example, at one SSA office, most staff attorneys have two to four years of private practice experience.

[154] GAO states that the "veterans' preference and the below average scores of the 1987 SSA staff attorney applicants on OPM's evaluation of their legal experience will continue to hinder the competitive status of women and SSA staff attorneys." GAO Report, *supra* note 151, at 3.

knowledge is not enough in and of itself to justify altering the selection criteria.[155] OPM might legitimately prefer individuals with outstanding backgrounds who do not have SSA specific knowledge, but who can acquire it, on the assumption that they will ultimately make better ALJs. As a GAO report concluded, "SSA staff attorneys were assigned below average scores on the first part of the examination which was a result, according to the ALJ Office, of their work having less scope, complexity, and impact than the work of many other applicants."[156] Nevertheless, it is difficult to believe that more decision writers are not deserving of promotion to ALJ status. To the extent that SSA provides more promotional opportunities to staff attorneys, they may be able to develop sufficient qualifying experience to allow them to become ALJs.

2. Increased Use of Decision Writers

Another suggestion that could improve the functioning of ALJ offices is to make increased use of decision writers. Some agencies use decision writers extensively while others make little or no use of them. Those agencies that use significant numbers of decision writers find that the writers help ALJs significantly increase their productivity, and allow the agencies to hire fewer ALJs. For the cost of an additional ALJ, an agency can hire two or more law clerks. SSA's AC provides a good example. It has approximately 12 decision writers per judge.

3. Computer Use

An additional way to improve decision writer efficiency is through an increased use of computers. Some ALJ offices do not provide computers to either their ALJs or their staff attorneys/law clerks. Other offices make extensive use of computers.

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[155] GAO, in a 1988 report, concluded that:

> OHA staff attorneys have requested that they be given extra credit under the ALJ examination for their subject matter expertise in social security law. OPM disagreed with this request on the basis that a particular kind of substantive legal experience is not an essential requirement for becoming an ALJ. According to the Assistant Director of OPM's ALJ Office, to give OHA staff attorneys extra credit, SSA would have to justify to OPM by means of a current job analysis that specialized experience is an important factor for successful ALJ performance. An OPM job analysis made in 1979 among incumbent ALJs, most of whom were employed in SSA, found no justification for basing ALJ selections on their experience in social security or other particular programs, according to the OPM Assistant Director. An OHA official said the office was considering preparing another job analysis since he believed circumstances had changed since OPM's analysis.

Id., at 8.

[156] *Id.*, at 10.

Many ALJ offices, especially SSA offices, could significantly improve their productivity through the use of computers. Some ALJ offices, especially ALJ offices, complain that their typists are backlogged. If SSA staff attorneys composed at the keyboard, they could minimize their dependence on secretaries and get work out quicker. Moreover, to the extent that SSA work is repetitive, staff attorneys could store form discussions on their computers and quickly add those discussions to decisions (making changes as necessary). Of course, in order to get maximum use of their computers, SSA must first find ways to deal with staff attorney discontent so that attorneys will have incentives to produce more.

SSA is in the process of computerizing. But, given the current situation in SSA, this process should be accelerated. Many SSA offices complain that they are drowning in a sea of cases. For example, one hearing office's seven ALJs issued 317 decisions in a single month. Nevertheless, the office took in 423 cases that month and fell further behind on its pending docket of 2,284. Nationally, SSA faces a huge backlog of cases. SSA might be able to significantly improve productivity by the simple expedient of providing all ALJs and staff attorneys with personal computers. Prices of high-quality computers have dropped so that SSA can outfit a 14-person office (seven ALJs and seven staff attorneys) for about $14,000. This move should bring about a significant reduction in the demand for secretarial services. The alternative, to hire additional ALJs and staff attorneys at more cost and perhaps less effectiveness, is clearly less attractive. New ALJs and staff attorneys who do not have computers may drag down the office's overall productivity by further overburdening already backlogged support personnel.

4. OPM Should Create a Decision Writer Job Series

OPM needs to establish a job series for law clerks, staff attorneys and others who provide legal support to ALJs. Agencies vary in terms of how they hire and compensate their decision writers. Some of the variances may be justifiable in terms of the burdens and duties imposed on the writers. Others may not. It would be desirable for OPM to study this issue and establish criteria that provide some basis for rationalizing the salaries and status of decision writers between agencies.

VI. Agency Appeal Procedures

Just as agencies differ regarding they manage ALJ offices, they also differ regarding their review of ALJ decisions. Some agencies have appellate review boards while others have judicial officers. A few agencies provide for direct appeal to some executive official who may consider the review board decision or directly review ALJ decisions.

This section examines the procedures used in a number of different agencies. At the outset, it is important to recognize that a single agency can have multiple appeal structures. Thus, even though a given agency may have a JO or an appellate board, it may also have other review mechanisms as well. This section attempts to describe the main routes of appeal from ALJ decisions.

A. Judicial Officer Systems

Two of the agencies studied (USDA and USPS) have judicial officers (JOs), and one of them (EPA) used the JO system until early 1992. EOIR has a Chief Administrative Hearing Officer (CAHO) who functions like a JO.

1. USPS

USPS JO system is illustrative.[157] Its JO is not an ALJ, but is an AJ qualified under the Contract Disputes Act of 1978.[158] He reviews decisions by USPS' ALJs except in a few cases arising under the Debt Collection Act (DCA) for which there is no appellate review. USPS' JO also serves as Chairman of USPS' Board of Contract Appeals (BCA),[159] and administratively supervises the ALJ office.[160] The JO's decisions constitute final agency action,[161] and there is no further review within USPS.[162] The JO can in some instances refer cases to the Postmaster General for decision,[163] but the present JO has not exercised that authority.[164] USPS' JO has a law clerk who assists him with his appellate review functions.[165]

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[157] 39 CFR §§226.2(e)(1)(vi)(1992), 273.2(d) (1992).

[158] 39 CFR §226.2(e) (1992).

[159] 39 CFR §226.2(e)(1)(v) (1992). Decisions by USPS' Contracting Officers are heard by USPS' Board of Contract Appeals (BCA) rather than by USPS' ALJ (who is not qualified under the Contract Disputes Act). The JO serves on the BCA as one of its four members. The BCA used to be a five member board. Decisions of USPS' BCA are final and are not subject to further review within the agency.

[160] 39 CFR §226.3(e)(1)(vi)(1992).

[161] 39 USC §204 (1988).

[162] *Id.*; *see also* 39 CFR §226.2(e) (1992)("The Judicial Officer is responsible for … (ii) Serving as the agency for the purposes of the requirements of the Administrative Procedure Act."); 23 CFR. 2817 (1958)("Decisions and orders of the Judicial Officer made under the authority of this order shall be the final departmental decision and order….").

[163] 39 CFR §226.2 (1992).

[164] In fact, the JO believes that the Postmaster General expects him to handle cases that come before him without referrals.

[165] The JO uses the law clerk to do research, draft opinions, check cites, etc. Historically, the JO has hired his clerks right out of law school, and has given them two-year appointments. He likes for them to stay for two years because he finds that it takes them a year or so to become proficient at the job. The JO believes that most clerks would not want to stay longer than two years, and that they should move on to other things. The JO is not adverse to making a long-term appointment provided that the clerk likes the research and writing component of the job, and the clerk and the JO get along. At the time of the interview, the JO was well satisfied with his clerk, who had been with him for two years, and stated that he would be

2. USDA

USDA has used the JO system since 1942 when the Secretary delegated his review authority to the JO.[166] In the 50-plus year history of the position, there have been only two JOs. The first served from 1942 to 1972, and the current one began in 1971. The JO is assisted by a staff attorney[167] and a legal technician.

Unlike USPS' JO, USDA's JO does not supervise the ALJ office. He simply reviews their decisions.[168] The JO's office is separate from the ALJ office, and has its own budget.

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willing to extend her appointment. At one point, he had two law clerks serving staggered terms so that he always had a clerk with some experience. The JO believes that his clerks learn marketable skills, since they do a lot of BCA work, and that they can readily move to other jobs in the public or private sector.

[166] The delegation is authorized by statute:

> Whenever the Secretary of Agriculture deems that the delegation of the whole or any part of any regulatory function which the Secretary is, now or after April 4, 1940, required or authorized to perform will result in the more expeditious discharge of the duties of the Department of Agriculture, he is authorized to make such delegations to any officer or employee designated under this section. The Secretary is authorized to designate officers or employees of the Department to whom functions may be delegated under this section and to assign appropriate titles to such officers or employees. There shall not be in the Department at any one time more than two officers or employees designated under this section and vested with a regulatory function or part thereof delegated under this section. The Secretary may at any time revoke the whole or any part of a delegation or designation made by him under this section.

7 USC §450d (1988); *see* Thomas J. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 GEO. WASH. L. REV. 277 (1957-58).

[167] The staff attorney, whose title is Assistant to the Judicial Officer, has been with the JO for six years. Given that the JO works alone, and has a large docket, he needs a more senior clerk. The Assistant serves at the GS-15 level, but the JO would like to have him upgraded to a GS-16.

The JO prefers to hire assistants on a permanent basis. He does so for productivity reasons. A new clerk cannot write more than five or six opinions a year while an experienced one can write as many as 15.

The Assistant's functions are somewhat limited since he cannot sign decisions. The Assistant reads the record in cases, and prepares a proposed decision for the JO's consideration. The JO must review both the proposed decision and the record.

[168] The current delegation provides as follows:

> The following delegations of authority are made by the Secretary of Agriculture to the Judicial Officer:
>
> (a) Pursuant to the provisions of the Act of April 4, 1940 (7 USC 450c-450g), and Reorganization Plan No. 2 of 1953 (5 USC 1976 ed., Appendix p. 764), the Judicial Officer is hereby authorized to act as final deciding officer in adjudication proceedings subject to 5 USC 556 and 557; in other adjudication proceedings which are or may be made subject to the "Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes" set forth in 7 CFR part 1, subpart H; in adjudication proceedings under the "Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act" set forth in 7 CFR part 1, subpart I; in rate proceedings under the Packers and Stockyards Act; and in reparation proceedings under statutes administered by the Department. As used herein the term "Judicial Officer" shall mean any person or persons so designated by the Secretary of Agriculture. The provisions of this delegation shall not be construed to

The JO usually reviews cases on the record with the parties being required to submit detailed briefs.[169] The parties have the right to request oral argument, but the JO has discretion about whether to grant it.[170] He rarely does. The JO's decisions constitute final agency action[171] and are not reviewable within the Department.[172] Judicial review is available except when the JO's decision is against the Department.

3. EOIR

EOIR's CAHO handles employer sanctions appeals. Like USPS' JO, EOIR's CAHO also administers the ALJ office. The CAHO automatically reviews all ALJ opinions issued in employer sanction and document fraud cases. He is assisted by a law clerk and a permanent staff attorney.[173] The CAHO is not required to issue an order in every case, but must modify or vacate an ALJ opinion within 30 days or the decision becomes final agency action. The CAHO is precluded from reviewing cases involving claims of employment discrimination based on citizenship status or national origin.[174] In those cases, the ALJ's

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> limit the authority of the Judicial Officer to perform any functions, in addition to those defined in the said Act of April 4, 1940, which from time to time may be assigned by the Secretary to him.

7 CFR §2.35. The JO hears cases under 32 different statutes including the Agricultural Marketing Agreement Act of 1937, the Packers and Stockyards Act, 1921, the Perishable Agricultural Commodities Act, the Federal Meat Inspection Act, the Animal Welfare Act, the Horse Protection Act of 1970, the Plant Quarantine Act, the Animal Quarantine Act, and the Cattle Contagious Diseases Act of 1903. In addition, when USDA's General Counsel's office prepares reparation orders for money damages under the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, the JO is responsible for signing them.

[169] 7 CFR §1.145(a), (b)(1993).

[170] 7 CFR §1.145(d)(1993).

[171] 7 CFR §1.145(i)(1993):

> A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[172] 7 CFR §2.35 (1993). *See* Utica Packing Co. v. Block, 781 F.2d 71 (6th Cir. 1986)(holding that the Secretary of Agriculture may not replace the JO in a case, after he has rendered a final decision, and then present a petition for reconsideration to the replacement). The JO does not have the right to review ALJ decisions in debarment cases. These cases are reviewed by the BCA. Non-procurement debarment cases are decided by the agency head (meaning the constituent organization), and the ALJ reviews the agency head's decision. The ALJ's decision is final. At one time, the JO did not have authority over Forest Service Sourcing Area Approvals. But that has now changed. 57 CFR 11261 (1992).

[173] The staff attorney is referred to as "Counsel" to the CAHO, and is hired on a permanent basis. The law clerk is hired on a one-year basis subject to renewal. The CAHO generally hires his clerks from the Department of Justice's Honors Program. The law clerk serves at the GS-11 level. The Counsel position has promotion potential to a GS-15.

[174] 8 USC §1324b(i) (1988).

decision constitutes final agency action and is reviewable only in a U.S. circuit court of appeals.

4. EPA

EPA used the JO system from 1972 to 1992. In the later years, EPA had as many as two JOs one of whom held the title Chief JO (CJO). The JOs did not supervise or manage the ALJ office. They did have the power to review appeals from ALJ decisions in all penalty cases as well as in two categories of permit cases.[175] In the majority of permit cases, the JOs were required to make a recommendation to the Administrator who rendered the final decision. In 1992, EPA abandoned the JO system and created an Environmental Appeals Board (EAB).[176]

B. Review Board Systems (with final review authority)

Most of the agencies studied use the review board system. Under this system, the agency has one or more appellate boards that review ALJ decisions. These boards typically function in a collegial fashion.

1. SSA

SSA's Appeals Council (AC)[177] is the largest review board, and it decides the most cases. Created in 1940,[178] the AC is now a 24-member body composed of Administrative Appeals Judges (AAJ) although only 22 of the judges review cases on a regular basis.[179] At present, none of the AAJs are ALJs although some prior AC members have been ALJs.

In the early days, the AC would sit as a panel. It does not do so today because the caseload is too large. SSA hearing offices dispose of about 300,000 cases per year, and the AC reviews about 65,000 of those cases. In some years, the AC considers as many as 80,000 to 90,000 appeals. In addition, the AC reviews a much smaller number of cases on its own motion (< 1,000 cases per year).[180] The AC is authorized to grant oral argument,[181] but it does so only about two dozen times per year (the AC receives very few requests for oral argument).[182] The AC's decisions constitute final agency action and are not reviewable by the Commissioner.

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[175] 57 Fed. Reg. 5320 (1992).

[176] *Id.*

[177] 20 CFR §§404.967 - 404.981 (1992).

[178] The Appeals Council was created in March, 1940, and initially had three members.

[179] The Chairman of the AC is the Associate Commissioner for Hearings and Appeals. He does not carry a case load. The Executive Director of the Office of Appellate Operations, who also serves as the Deputy Chairman of the AC and Deputy Chief AAJ, also does not carry a full case load.

[180] It does so pursuant to 20 CFR §404.969 (1992).

[181] 20 CFR §404.976(c) (1992).

A case is first assigned to an "A" judge, and then is further assigned to an analyst within that judge's branch.[183] "A" judges handle cases from a particular judicial circuit,[184] and are randomly assigned cases from those circuits based on the claimant's Social Security number.[185]

The AC is assisted by a corps of approximately 230 hearings and appeals analysts,[186] as well as 16 appeal officers,[187] and civil action analysts.[188] The analysts are unionized[189] and are hired on a permanent basis. They are organized into branches (one branch for each judge), each of which has about 13 analysts. Each branch is assigned to an AC AAJ, and the analysts generally work with their assigned judge.[190] Each Branch is managed by a Branch Chief who has supervisory responsibility over the analysts.[191]

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[182] Under a new program, the AC grants oral argument in a few cases involving significant issues.

[183] There are some exceptions to this procedure. The Chairman, or Deputy Chairman, can specify which AAJs shall hear a particular case. In addition, if the AC believes that a case presents important policy issues, the AC can consider the matter *en banc* and direct the panel (the "A" and "B" judges) how to decide the case. The AC receives few requests for oral argument, and disposes of more than 75% of all cases on the pleadings.

[184] Judges are grouped by circuit so they will be more knowledgeable about, and responsive to, cases within their circuits.

[185] Each judge is assigned a range of Social Security numbers, and receives all appeals within that range. Since the last four digits of all Social Security numbers are randomly assigned, and the Council has found that the use of such numbers ensures that its case load is evenly distributed.

[186] The AC receives cases in several different ways. In most instances, the AC receives appeals from claimants who have received unfavorable or partially unfavorable ALJ decisions. In some instances, the AC initiates review on its own motion. AC initiated review is discretionary, and is designed to determine whether non-appealed decisions (usually favorable decisions) were correctly decided. Before the AC accepts a case on its own motion, an analyst reviews it (they randomly sample unappealed cases) and makes a recommendation. Only when the analyst believes that the regulatory conditions for review are present will the analyst recommend that the AC take the case on its own motion. This happens only a small percentage of the time.

[187] Each AAJ is assigned an attorney to serve as an Appeals Officer (AOs). The AOs are GS-14s, and are assigned to and expected to serve as a resource for the AAJs. Appeals Officers are often given cases about which AAJs have concerns. AOs analyze the cases and make recommendations to the AC. The AC has thought about giving AOs the authority to deny requests for review, but the AC has never adopted regulations giving AOs this authority.

Appeal Officers seem to be relatively content with their positions. However, the program has only been in effect for four plus years. Interestingly, even though few SSA staff attorneys are promoted from staff attorney to ALJ, eight of the AO's have achieved promotion. This may be due to the fact that they gained additional experience as AOs.

[188] Historically, Civil Action Analysts (CAA) monitored federal court litigation involving AC decisions. They examined the record in pending cases, and made recommendations to the regional attorneys. However, under a pending reorganization, CAA's are being merged with OAO's analysts.

[189] The union contains analysts, secretaries and others.

Analysts are charged with undertaking the initial review of appealed cases. The analyst is expected to analyze the case—including the record, the decision at the hearing level, and the issues being raised—from both a procedural and a substantive perspective.[192] Once the analyst completes this review, the analyst makes a recommendation to the "A judge" about how the request for review should be handled (e.g., affirmed, dismissed, remanded).[193] This recommendation is submitted in the form of a draft decision (affirmance, remand or denial of review). The A judge then reviews the case and decides how to proceed.[194] Most of the AC's analysts are not lawyers.[195]

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[190] In some cases, such as when an AAJ is on leave or unavailable, a case recommendation may be assigned to another AAJ. In addition, when ALJs serve as visiting AAJs on the AC, some analysts send recommendations to them.

[191] Analysts are assigned to the Office of Appellate Operations (OAO). Even though analysts submit their work to AC AAJs, they are not supervised by the AAJs. Rather, they are managed by their Branch Chiefs. Like the AC, OAO is part of SSA's OHA. A Deputy Director supervises the branches and branch chiefs.

[192] The AC can dismiss an appeal under the following circumstances:

> The Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended. The Appeals Council may also dismiss any proceedings before it if-
>
> (a) You and any other party to the proceeding files a written request for dismissal; or
>
> (b) You or any other party to the proceedings dies and the record clearly shows that dismissal will not adversely affect any other person who wishes to continue the action.

20 CFR §404.971 (1992).

[193] By statute, the AC "may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge." 20 CFR §404.967 (1992).

[194] "A" judges are selected based on two factors: the judicial circuit from which the case arose and the claimant's social security number. The AC is organized into jurisdictional groups that correspond to federal judicial circuits (although there may be more than one group per judicial circuit). This is done so that AC judges will act consistently with, and be responsive to, judicial decisions from the circuits. When an appeal is filed with the AC, it is assigned to a judge in the jurisdictional grouping assigned to the circuit from which the case arose. Within the jurisdictional groupings, cases are assigned on the basis of social security numbers. Each judge is assigned a range of social security numbers, and receives all appeals within that range.

"A" judges have the authority to dispose of cases if their action does not disturb the decision below (if they deny or dismiss the appeal). If the "A" judge rejects the ALJ's decision, intending to reverse or remand, then a second AAJ (the "B" AAJ), must concur in the action. The "B" judge is randomly selected from all AC AAJs (again, based on the last four digits of the claimant's Social Security number). If the "A" judge and the "B" judge agree regarding the resolution of the case, they have the power to dispose of the case. If the judges disagree, then a third judge (the "C" judge) is asked to review the case. The "C" judge is usually appointed by the AC's Deputy Chairman. The two judges who agree then decide the case. Judges do not issue dissents or state minority views.

There are some exceptions to this procedure. The Chairman, or Deputy Chairman, can specify which AAJs shall hear a particular case. In addition, if the AC believes that a case presents important

"A" judges have the authority to dispose of cases if their action does not disturb the decision below (if they deny or dismiss the appeal). If the "A" judge rejects the ALJ's decision, intending to reverse or remand, then a second AAJ (the "B" judge), must concur in the action. The "B" judge is randomly selected from all AAJs (again, based on the last four digits of the claimant's Social Security number). If the "A" judge and the "B" judge agree regarding the disposition of a case, they have the power to dispose of it. If the judges disagree, then a third judge (the "C" judge) is asked to review the case. The two judges who agree then decide the case. Judges are not allowed to issue dissents or state minority positions.

2. EPA

In 1992, EPA abandoned the JO system in favor of an Environmental Appeals Board (EAB).[196] When the switch to a review board was made, the CJO became a member of the new board. The Board consists of three co-equal members, and reports directly to the Administrator.[197] The Board has authority to review decisions in all permit and penalty cases.[198] Board members are supported by 5 1/2 staff attorneys.[199]

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policy issues, the AC can consider the matter at an *en banc* meeting, and can then direct the panel how to decide the case. The AC receives few requests for oral argument, and disposes of more than 75% of all cases on the pleadings.

[195] Of the 230 or so analysts, only about eight are attorneys. Only two are attorneys. When the Office of Appellate Operations (OAO) (for which the analysts work) announces openings, it receives few applications from attorneys. Moreover, when attorneys are hired, they usually transfer to the Division of Litigation once they gain some experience.

Within OAO, there is some disagreement about whether attorneys are needed. The quality of non-attorney applicants is usually quite good. OAO claims that very talented individuals in SSA field offices and district offices want the job. Indeed, when OAO announces openings, it frequently receives as many as 300 applications for 20 positions. OAO has received as many as 1,000 applications, and many of the applicants hold college degrees. In addition, many have extensive SSA experience, as well as knowledge of the disability program.

Field office and district office employees are interested in the job for two reasons. First, the analyst position has promotion potential to a GS-13. In the field, most claims representatives are GS-10s, and even some managers serve only at GS-11 and GS-12 levels. Second, in order to obtain a GS-12 in the field, one must be in a supervisory position. These positions are stressful, and many analysts who were field managers complain about lack of adequate support. Some analysts stated that the analyst position is more interesting than field work.

[196] 57 Fed. Reg. 5320 (1992).

[197] The EAB renders decision by majority vote. Two board members constitute a quorum, and the Board is authorized to sit in a panel of two when one member is absent or unavailable.

[198] *Id.*

[199] The staff attorneys vary in grade from GS 12 to 14. A lead judge and a lead staff attorney are assigned to each case. Both the lead judge and the lead staff attorney are selected by rotation.

EAB judges vary in their use of staff attorneys. All judges have the lead attorney prepare a docket statement outlining the issues presented by a new case. At that point, some judges occasionally prefer to prepare draft opinions themselves without the help of a staff attorney. Other judges review the case and

With EAB's creation, EPA's Administrator is virtually removed from the appellate process. The Administrator does not have the power to review or reverse Board decisions. The EAB can certify cases to the Administrator, and must involve the Administrator (who casts the deciding vote) when only two EAB members are available to hear a case and they are unable to reach agreement.

3. DOL

The Department of Labor (DOL) has five review boards that review different types of cases. Included are the Benefits Review Board (BRB), the Board of Contract Appeals (BCA),[200] the Wage Appeals Board (WAB),[201] Board of Alien Labor Certification Appeals (BALCA).[202] Some appeals are not routed to these boards, but rather are decided by Labor's Deputy Secretary with the assistance of Labor's Office of Administrative Appeals (OAA).[203]

(a) Benefits Review Board

The BRB reviews Black Lung Benefits Act[204] and Longshore and Harbor Workers' Compensation Act decisions.[205] It is a five-member board[206] headed by

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ask the lead attorney to prepare a draft decision. Once the draft is ready, the judge reviews it. The staff attorney might then be asked to prepare additional drafts. When the lead judge is satisfied with the decision, it is then circulated to the other judges for further review and ultimately a vote. EAB judges have the right to join an opinion, as well as to concur or dissent from it.

EAB staff attorneys are hired on a permanent rather than a temporary basis. The EAB has not experienced any problem with permanent hires. However, the EAB is so new that its experience with permanent clerks is relatively limited. The EAB does have four staff attorneys who worked for the JO as staff attorneys, and one of them has been performing staff attorney functions for 12 years.

EAB judges do not expect to have major morale problems with their clerks for several reasons. First, EPA work is more interesting than SSA work. Second, EAB staff attorneys come to the agency because they are in tune with the agency's goals. Finally, environmental attorneys are fairly marketable so that any attorney that becomes genuinely dissatisfied with the position can readily find another job. EAB members claim that many clerks are satisfied with the job after having worked for large firms and found that the lifestyle was not to their liking. Nevertheless, EAB judges believe that many staff attorneys do not regard their position as permanent and plan to move on to something else eventually.

[200] The BCA is a part-time function of three ALJs.

[201] 29 CFR Part 7 (1992). In 1992, the Board of Service Contract Appeals, 29 CFR Part 8 (1992), was combined with the WAB.

[202] 20 CFR §§656.3, 656.26, 656.27 (1992). BALCA has two staff attorneys who serve at the GS-14 level.

[203] Included are Clean Air Act cases, 42 USC §7401, *et seq.* (1988), Conformity Substantial Compliance Program cases, 26 USC §3304(c) (1988), Employee Reorganization Act of 1974 cases, 42 USC §5801, *et seq.* (1988), Safe Drinking Water Act cases, 42 USC §3001, *et seq.* (1988), Solid Waste Disposal Act cases, 42 USC §6901, *et seq.* (1988), Toxic Substances Control Act cases, 15 USC §2601, *et. seq.* (1988), Surface Transportation Assistance Act cases, USC § (1992), Office of Federal Contracts Compliance cases, 29 USC §793 (1988), and Rehabilitation ERA Veterans' Readjustment Assistance Act of 1974 cases. 38 USC §2012 (1988).

[204] 20 CFR §725.481-482 (1992).

a Chairman.[207] The Secretary can appoint up to four temporary members who are denominated Acting Administrative Appeals Judges. At the time of the interview, the BRB had only one temporary judge. BRB decisions are final,[208] and are only reviewable in the U.S. Court of Appeals for the appropriate circuit.[209] The BRB sits in panels of three except in those few instances when it sits en banc.[210]

The BRB has an extremely large support staff.[211] At the date of the interview, the BRB's Executive Counsel had 65 1/2 FTEs that included legal technicians, clerks, paralegals, and a small staff of attorneys. The Counsel manages the docket (intake and outtake of all mail and filings), checks records to make sure that they are complete,[212] handles procedural motions (extensions,

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[205] 33 USC §§901, *et seq.* (1992). The BRB also has jurisdiction over D.C. Workers' Compensation Act, Nonappropriated Fund Instrumentalities Act, Defense Base Act and Outer Continental Shelf Lands Act cases.

[206] 33 USC §921(b)(5) (1988), 20 CFR §801.201(a) (1992). The BRB is allowed to have more than five members:

> Upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve as temporary Board members in addition to the five permanent Board members. Up to four such temporary members may serve at any one time. The term of any temporary Board member shall not exceed one year from date of appointment.

20 CFR §801.201(d) (1992).

[207] 20 CFR §801.2(a)(3) (1992).

[208] 20 CFR §482 (1992).

[209] In Longshore and Harbor Workers' cases, the appeal is to the U.S. Court of Appeals for the Circuit in which the injury occurred.

[210] 20 CFR §801.301 (1992):

> (a) For the purpose of carrying out its functions under the Acts, whenever action is taken by the entire permanent Board sitting en banc, three permanent members of the Board shall constitute a quorum, and official action of the permanent Board can be taken only on the concurring vote of at least three permanent members.
>
> (b) The Board may delegate any or all of its powers except en banc review to panels of three members. Each panel shall consist of at least two permanent members. Two members of the panel shall constitute a quorum and official panel action can be taken only on the concurring vote of two members of the panel.
>
> (c) A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members sitting en banc.
>
> (d) En banc action is not available in cases arising under the District of Columbia Workmen's Compensation Act.

See 33 USC §921(b)(5) (1993).

[211] The BRB has an administrative section which has 13 FTEs including two secretaries. This section is responsible for general management functions (reception, distribution of mail), ADP (case tracking & other technical systems), inquiries (usually from claimants or congressmen inquiring about the status of a case), and other management issues (*e.g.*, budgeting, tracking expenditures, time and attendance).

[212] Files are supposed to be complete and ready to be decided when they are passed on to staff attorneys. As a result, staff attorneys do not have to request documents and wait for them to arrive.

show cause orders, stay of payments, and some dispositive motions), and monitors remands.

Once a file is ready for assignment, it is sent to the BRB's Office of General Counsel (OGC). OGC is divided into four divisions each of which is headed by an Associate General Counsel (AGC). Three of the divisions handle Black Lung cases. The remainder handle Longshore cases. Each division is further subdivided into branches that are headed by a Deputy Associate General Counsel (DAGC) and are staffed by four to five staff attorneys.[213] The BRB assigns cases to staff attorneys based on the anticipated level of difficulty,[214] and the staff attorneys are expected to process the case (read the record and prepare a proposed decision). Cases are processed on a FIFO basis.

Once staff attorneys complete their work, the BRB handles cases in one of three ways. In some cases, the staff attorney prepares a memo setting forth the issues in the case, and outlining the various options available to the BRB. This memo then circulates through several levels of supervisory review. When a case is considered to be less complex (because it involves fewer issues), it is sometimes orally presented. Three judges hear the oral presentations and make an initial decision to affirm, reverse or remand. When the judges hear oral presentations, they handle as many as ten cases in an hour. When a case presents difficult or novel issues, the case may be scheduled for a Board Conference involving all BRB judges and all division heads.[215] When this happens (which is rare), the judges are given materials a week in advance so that they can think about the issues presented.

Under all three processes, once the Board agrees on the resolution of a case, a final decision is prepared. The decision is circulated to the judges for their signatures. Once a decision has been signed, it is sent back to the Executive Counsel for issuance.[216]

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[213] Many of the staff attorneys serve at the GS-11 level although they have promotion potential to a GS-13. Deputy Assistant General Counsels serve at the GM-14 level, and the AGC serves as a GM-15. The Board members themselves are Senior Level.

[214] When a case is ready for assignment, it is sent to the case assignment area. It is then reviewed by a supervisory attorney who determines the level of difficulty (some cases are rated as training cases for new attorneys, others are rated as more difficult), and decides how the case should be assigned. Once a case is graded, it is available for assignment.

[215] Board Conferences are held about once a month. Approximately five cases are considered at these conferences. In a few instances, Board members travel to hear oral arguments. Such cases are Board conferenced following the argument. The BRB has had fewer oral argument trips in recent years. At the time of the interview, it had been nine months since the last oral argument was held. Some believe that the smaller number is attributable to budget constraints. Others believe that it is due to the former Chief Judge who chose not to conduct oral arguments.

[216] There appears to be some dissatisfaction on the part of BRB staff attorneys. BRB employees claimed that this dissatisfaction is due to several factors: the fact that Black Lung cases are repetitive, the quantity of cases coming before the BRB, and the fact the BRB pushes all attorneys to work at an acceptable or greater level. In order to deal with the boredom, some attorneys transfer back and forth

(b) Wage Appeals Board

The WAB reviews Davis-Bacon Act[217] and Service Contract[218] decisions. Until July 1992, the WAB was composed of part-time members.[219] However, it is now a full-time board composed of three members.[220] The WAB is a collegial body that acts based on a majority vote of its members.[221] The WAB has discretion about whether to review a decision, and can decline to do so "whenever in its judgment a review would be inappropriate or because of lack of timeliness, the nature of the relief sought, or other reasons."[222] However, review is required whenever any Board member votes to review a case.[223] The WAB can dispose of a case based on a majority vote of the three board members.[224] The WAB's decisions are final and are not reviewable within the agency. They are reviewable only in the federal courts.

C. Review Boards (that are subject to further discretionary review)

Some agencies that have appellate review boards provide for discretionary review by the agency head (or by some high-level political appointee who serves in the agency head's place) of review board decisions.

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between Longshore and Black Lung cases. A few attorneys transfer to the Executive Counsel, and some get promoted to supervisory level positions. Some attorneys like working for the BRB job because it involves 9 to 5 job, and is not terribly stressful. The BRB is unionized.

[217] 29 CFR, Part 7 (1992) & Secretary's Order 1-91 (Jan. 18, 1991).

[218] Secretary's Order 3-92 (July 10, 1992).

[219] The WAB was established in the early 1960s to review Davis-Bacon cases. Current members (who served on the part-time board) believe that the Board did not function well in a part-time capacity. Members had difficulty managing their docket. When the WAB began handling Service Contract cases, the Board was converted to full-time. At the time, there was a backlog of 35 SCA cases. By July 1992, the WAB docket was essentially current.

[220] The WAB is supported by an Executive Secretary and an Administrative Assistant. The WAB's Executive Secretary is the only staff attorney. There are no law clerks.

[221] 29 CFR §7.8(c) (1992).

[222] 29 CFR §7.8(a) (1992).

[223] 29 CFR §7.8(c) (1992).

[224] The WAB's Chairman assigns work to its members, and attempts to distribute the caseload equitably. When a case is received, the Board first tries to determine whether there is a request for an oral hearing and whether the case ought to be reviewed. If an oral hearing is not requested, the Board may discuss the issues and then ask one member to prepare a draft opinion. This opinion is then circulated to other board members. Board members have the right to issue concurrences and dissents.

1. Interior

The Department of the Interior (DOI) has four different review boards[225] that are staffed by a total of 22 AJs. These boards include the Board of Contract Appeals (IBCA),[226] the Board of Land Appeals (IBLA),[227] and the Board of Indian Appeals (IBIA).[228] Interior also appoints Ad Hoc Boards of Appeal (Ad Hoc Board).

Interior's Director has supervisory responsibility over all three boards,[229] as well as over Ad Hoc Boards when they are established. But each board has a Chief AJ (Chairman)[230] who is responsible for the internal management and administration of the board.[231] The Boards vary in size as the following chart demonstrates.

Board	**Board Members**	**Staff Attorneys**
IBCA	3 AAJs	2
IBIA	2 AJs	0[232]
IBLA	10 AJs	16

DOI's boards are expected to review and finally decide matters within their subject matter jurisdiction.[233] Their decisions constitute final agency action and are subject to judicial review[234] provided that they are not reviewed by the Secretary or the Director.[235] Even though the Director has the right to serve on some boards, he rarely exercises that authority.

Both Interior's Secretary, and its Director of OHA, have the authority to review decisions of all boards except those of the IBCA,[236] and both have the right to assume jurisdiction over cases before the IBIA, IBLA and the Ad Hoc Boards (except, again, the IBCA).[237] In some instances, the parties request the Director to assume jurisdiction.[238]

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[225] 43 CFR §4.1(a) (1991). At one point, Interior had other boards including the Alaska Native Claims Appeal Board and the Board of Surface Mining and Reclamation Appeals. However, these boards were merged into the IBLA. *See* 47 CFR 26390 (1982) & 42 CFR 7564-65 (1984).

[226] 43 CFR §4.1(b)(1) (1991). The IBCA has three attorneys. The attorneys are designated as hearing officers, and they actually preside at hearings. Each serves at the GS-14 level. The attorneys also draft opinions, but they are not allowed to sign them. The attorneys are hired on a permanent basis.

[227] 43 CFR §4.1(b)(3) (1992). Administrative appeals were formerly handled by the Solicitor's Office. But the process was awkward and often placed the Office in the uncomfortable position of reviewing its own decisions in a context in which there might be questions about its impartiality. Current regulations were designed to separate adjudicative functions from prosecutorial and investigative functions.

[228] 43 CFR §4.5 (1992).

[229] 43 CFR §4.5(b)(4) (1991).

[230] 43 CFR §4.2(a) (1991).

[231] 43 CFR §4.2(c) (1991).

[232] The IBIA does have a legal assistant/secretary.

[233] 43 CFR §4.1(b) (1991).

[234] 43 CFR §4.21(b) (1991).

[235] 43 CFR §4.21(b) (1991).

[236] 43 CFR §4.5 (1992):

Secretaries vary regarding how frequently they exercise this jurisdiction. In recent years, the Secretary and Director infrequently assume jurisdiction over cases (although the Secretary is frequently asked to do so).

(a) Interior Board of Land Appeals

The IBLA, DOI's largest review board,[239] was founded in 1970. In addition to the Chief AJ,[240] this board also has a Deputy Chief AJ. DOI's Director is an ex officio member of the Board.[241] The IBLA sits in panels of two,[242] and its decisions are final if they are not reviewed by the Secretary or the Director.[243] If

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> (a) Secretary. Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law. The authority reserved to the Secretary includes, but is not limited to:
>
> (1) The authority to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office, except a case before the Board of Contract Appeals which is subject to the Contract Disputes Act of 1978, and render the final decision in the matter after holding such hearing as may be required by law; and
>
> (2) The authority to review any decision of any employee or employees of the Department, including any administrative law judge or board of the Office, or to direct any such employee or employees to reconsider a decision, except a decision by the Board of Contract Appeals which is subject to the Contract Disputes Act of 1978.
>
> (b) The Director. Except for cases or decisions subject to the Contract Disputes Act of 1978, the Director, pursuant to his delegated authority from the Secretary may assume jurisdiction of any case before any board of the Office or review any decision of any board of the Office or direct reconsideration of any decision by and board of the Office.
>
> (c) Exercise of Reserved Power. If the Secretary or Director assumes jurisdiction of a case or reviews a decision, the parties and the appropriate Departmental personnel will be advised in writing of such action, the administrative record will be requested, and, after the review process is completed, a written decision will be issued.

[237] 43 CFR §4.5 (1992).

[238] The Director receives only about six such requests per year, and does not grant all of them. In only one instance within the year prior to the interview had the Director actually reviewed a case. In that case, the Director did not reverse, but rather simply altered some language.

[239] It is supported by 15 staff attorneys who are also hired on a permanent basis. They serve at GS-13 and GS-14 levels. Their main function is to draft opinions for IBLA's AAJs. Staff Attorneys are not allowed to preside at cases, or to serve as acting AJs, except on some routine summary disposition cases (cases that are disposed of on procedural grounds).

[240] 43 CFR §4.2 (1991).

[241] *Id.*

[242] *Id.*

[243] 43 CFR §4.21 (1992). The IBLA has jurisdiction over the following matters:

> The Board decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to: (i) The use

the two judges cannot agree regarding the resolution of a case, the Chief appoints a third AJ to break the deadlock.[244] A concurrence of two AJs is sufficient for a decision.[245] The IBLA is supported by 16 staff attorneys, one of whom serves as a docket attorney.[246]

(b) Interior Board of Indian Appeals

The IBIA[247] has two AJs, one of which serves as the Chief AJ.[248] In addition, there are two alternate members who ordinarily serve on the IBLA. The IBIA does not have any staff attorneys or law clerks. Like the IBLA, the IBIA's decisions are reviewable by the Secretary and the Director, but are final if not reviewed.[249] Although Board members are subject to performance appraisals, no

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> and disposition of public lands and their resources, including land selections arising under the Alaska Native Claims Settlement Act, as amended; (ii) the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf; and (iii) the conduct of surface coal mining under the Surface Mining Control and Reclamation Act of 1977. Special procedures for hearings, appeals and contests in public land cases are contained in Subpart E of this part; special procedures for hearings and appeals under the Surface Mining Control and Reclamation Act of 1977 are contained in Subpart L of this part.

43 CFR §4.1(b)(3) (1992).

[244] *Id.*

[245] *Id.*

[246] The office also has an office administrator who has two assistants (one is a docketing clerk and the other is a clerical who handles routine orders, makes copies, etc.).

[247] The IBIA was created in 1970. Until 1975, the Board heard cases relating to the probate of estates of Indians who died owning trust or restricted status property. The Board's jurisdiction was significantly expanded in 1975. The Board describes its own jurisdiction as follows:

> In view of the Department's extensive supervision of Indian affairs, the nature of cases now appealable to the Board is vast and complex. The Board may receive cases arising under hundreds of treaties, statutes, and regulations bearing on the Department's dealings with Indians. In addition to Indian probate cases, the Board adjudicates appeals involving, for example: rights-of-way over Indian lands; recreational, residential, farming, trespass on trust or restricted property; general, educational, or home improvement assistance; business development grants and loan guaranties; contracts entered into by Indian enterprises and tribes; sale or transfer of trust or restricted lands; self-government matters; tribal government and election issues; grants under the Indian Child Welfare Act and the Small Tribes, Planning Grant, and Training and Technical Assistance programs; the acquisition of property in trust; claims against trust property; restoration of lands to Indian tribes; operations under the Indian Gaming Regulatory Act; the operation of BIA irrigation projects; Indian preference in employment; recognition of Indian tribes; and tribal ownership of land.

Undated document labelled "The Interior Board of Indian Appeals."

[248] The IBIA is supported by a legal assistant/secretary who does not do any opinion drafting. The legal assistant is a GS-8. There are no staff attorneys.

[249] 43 CFR §4.1(b)(2) (1992). Its jurisdiction extends to:

(i) Administrative actions of officials of the Bureau of Indian Affairs, issued under 25 CFR Chapter I, except as limited in 25 CFR Chapter I or §4.330 of this part, and board member has ever been dismissed. The IBIA ordinarily acts by consensus. If the two AJs disagree, they bring in a third judge.

(c) Ad Hoc Board of Appeals

The Ad Hoc Boards of Appeal are purely ad hoc. Boards are appointed as the need arises. The Board's jurisdiction is also ad hoc.[250] When a case is received that does not fall within the jurisdiction of a standing board, the Director has discretion to appoint an Ad Hoc Board or to review the case personally. When the Director appoints an ad hoc board, he has discretion to select members from among the AJs, his Special Counsel, or the Deputy Director. Occasionally, he serves on Boards himself.

2. FCC

Until 1961, FCC Commissioners reviewed and decided decisions themselves. In that year, the FCC asked Congress for permission to establish an appellate board in order to lighten its appellate workload and allow it to focus on important domestic and international policy issues.[251] Once the Board was established,[252] the FCC delegated most of its authority to the Board but reserved to itself the right to review revocation and renewal decisions.[253] In 1982, the Review Board's power was extended to include such cases as well.[254]

(ii) Orders and decisions of administrative law judges in Indian probate matters other than those involving estates of the Five Civilized Tribes of Indians and Osage Indian wills. The Board also decides such other matters pertaining to Indians as are referred to it by the Secretary, the Director of the Office of Hearings and Appeals, or the Assistant Secretary—Indian Affairs for exercise of review authority of the Secretary. Special regulations applicable to proceedings before the Board are contained in Subpart D of this part.

Id.

[250] 43 CFR §4.1(b)(4) (1992):

> Appeals to the head of the Department which do not lie within the appellate review jurisdiction of an established Appeals Board and which are not specifically excepted in the general delegation of authority to the Director may be considered and ruled upon by the Director or by Ad Hoc Board of Appeals appointed by the Director to consider the particular appeals and to issue decisions thereon, deciding finally for the Department all questions of fact and law necessary for the complete adjudication of the issues. Jurisdiction of the Boards would include, but not be limited to, the appellate and review authority of the Secretary referred to in Parts 13, 21, and 230 of this title, and in 36 CFR Parts 8 and 20. Special regulations applicable to proceedings in such cases are contained in Subpart G of this part.

[251] 47 USC §155(d)(1) (1964). *See* James O. Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969)(discussing the FCC Review Board and its functioning).

[252] 47 USC §155(c)(1) (1988).

[253] In addition, if the Commission so directs, a case is not appealable to the Review Board. 47 CFR §0.361(a) (1992).

[254] The Commission created the Board in order to lighten its own appellate workload and to allow it to focus on important domestic and international policy issues. For many years, the Commission directly

The FCC Review Board must have at least three members,[255] which it currently has, and has had as many as five members. It is managed by a Chairman. Review Board members serve indefinitely on a full-time basis.[256] The Board generally sit in panels of three, but only two members are required to review a decision.[257] In an appropriate case, the Review Board can certify a matter to the Commission.[258] Board members are career employees who are not supposed to make policy decisions. They are supported by three staff attorneys.[259] The Review Board exercises record review, but considers legal issues de novo.

The Review Board's decisions constitute final agency action if they are not reversed by the Commission. However, the Commission retains the right to review all of the Board's decisions, and also has the power to direct that a case be presented directly to the Commission. The Commission rarely exercises this latter authority. The Commission reserves to itself the right to decide all policy questions, and requires the Board to certify such questions to it.

The Commission exercises its review authority on a discretionary basis. An application for Commission review is a necessary prerequisite to a judicial challenge. Filing an application is much like filing a petition for certiorari with the U.S. Supreme Court. The Commission permits only a short pleading (not more than ten pages) which identifies important issues that ought to be reviewed.

Even if the Commission decides to review a decision, it will usually do so without further input from the parties. The Commission has not permitted oral argument in the last thirty years. Moreover, the Commission often refuses to allow the parties to file full briefs (beyond the short applications that they initially submitted) unless a novel issue is raised. The Commission usually decides a case based on the Application for Review although it may consider on the record compiled in prior proceedings as well as the briefs filed in those proceedings. For many years, the Commission would simply issue an affirmance or a denial. In recent years, the Commission has been adding footnotes and explanations. Sometimes, when it affirms, the Board will issue comments buttressing the Review Board's decision. When it overturns the Board, it will sometimes issue a lengthy decision.

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reviewed all ALJ decisions. With the establishment of the Board, the Commission delegated some of its authority to the Review Panel. However, the Commission itself reviews the Board's determinations, and retains the power to direct that a case be presented directly to it without going through the Board. The Commission rarely exercises this authority. *See* Amdt. of Parts 0 & 1, 8 FCC 2d 377 (1981).

[255] 47 CFR §0.361(b) (1992).

[256] *Id.*

[257] 47 CFR §0.361(c) (1992).

[258] 47 CFR §0.363 (1992).

[259] The FCC has two senior lawyers, a Chief for Law and Administration, an administrative assistant, and secretarial support for a total of nine FTEs. The lawyers serve at the GS-15 levels. The Administrative Assistant serves at the GS-9 level, and the secretaries serve at the GS-8 level.

D. Direct Review By the Agency Head

At a few agencies, the agency head is actively involved in the review process, and directly reviews adjudicative decisions (albeit with help from subordinates). These agencies include the Commerce Department, various offices within the Departments of Transportation and Labor, and the NRC.

1. Commerce

Within the Commerce Department, ALJ decisions are reviewed by the constituent administrations (NOAA, BXA and the Patent Office). In each instance, the review is rendered by the agency head with assistance from subordinates. These subordinates are "walled off" from other employees. NOAA's review (NOAA has, by far, the most cases) is purely discretionary.[260] NOAA does not grant oral argument.[261]

2. DOT

The Department of Transportation's (DOT) Office of Hearings hears cases for a number of different agencies within DOT including the Federal Aviation Administration (FAA), Federal Highway Administration (FHA), Federal Railroad Administration (FRA), the National Highway Transportation Safety Administration (NHTSA), the Maritime Administration (MARAD), and the Research and Special Programs Administration (RSP).[262] They also decide some cases for the Office of the Secretary of DOT.

DOT appellate procedures vary depending on the agency involved. In most instances, ALJ decisions are reviewed by the administrator of the agency in question. The actual review is done by a subordinate official who submits a proposed decision to the administrator. A few cases are appealed to the Office of the Secretary including all international route and economic enforcement cases.

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[260] 15 CFR §904.273(b) (1993). Those who wish to challenge an order must file a petition for discretionary review which alleges one of the following grounds:

> (1) A finding of a material fact is clearly erroneous based upon the evidence in the record;
>
> (2) A necessary legal conclusion is contrary to law or precedent;
>
> (3) A substantial and important question of law, policy, or discretion is involved (including the amount of the civil penalty); or
>
> (4) A prejudicial procedural error has occurred.

Id.

[261] 15 CFR §904.273(e) & (h) (1993).

[262] DOT does have a Board Contract Appeals (BCA) that hears appeals from decisions of contracting officers as well as claims for extraordinary relief. 49 CFR §1.23(k) (1991). However, this office is not related to the work of the ALJs. The BCA's judges are not ALJs.

(a) FAA Office of Chief Counsel

FAA's Office of Chief Counsel handles certain routine matters,[263] and it prepares opinions for FAA's Administrator.[264] The opinions are written by the Adjudications Branch which, serves under the Assistant Counsel for Litigation,[265] and which is walled off from branches that perform investigative and prosecutorial functions. This branch includes three attorneys who analyze records and prepare the initial drafts of opinions. The opinions are then reviewed by the Assistant Counsel for Litigation, the Chief Counsel,[266] and then the Administrator.[267]

The review process can vary with the Administrator. Most administrators expect their staff to review the hearing record, and may or may not personally review the record themselves. The administrators may or may not read the briefs. As a result, the review process tends to vary depending on the interests of the administrator, the subject matter of the case, and whether the Administrator agrees with the staff recommendation.

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[263] The Chief Counsel and the Assistant Chief Counsel for Litigation have authority to do the following things under the Civil Penalty Assessment and Demonstration Program:

> (a) To grant or deny extensions of time to file briefs; to grant or deny requests to file additional briefs; and to approve or disapprove other deviations from, or requests for changes in, procedural requirements;
>
> (b) To stay the effectiveness of decisions or orders pending reconsideration by the FAA decisionmaker;
>
> (c) To issue orders staying, pending judicial review, orders of the FAA decisionmaker, and to consent to the entry of judicial stays with respect to such orders;
>
> (d) To issue orders dismissing appeals from initial decisions of administrative law judges pursuant to the request of the appellant or due to failure to perfect;
>
> (e) To dismiss, summarily, petitions to reconsider or modify which are repetitious or frivolous; and
>
> (f) To correct FAA decisionmaker orders by eliminating typographical, grammatical, and similar errors, and making editorial changes therein not involving matters of substance.

57 FR 58280 (Dec. 29, 1992).

[264] As a general rule, the cases involve allegations of wrongdoing by pilots, mechanics, airlines, and others involved in the airline industry. They also involve cases arising under the Hazardous Materials and Transportation Act relating to aviation. 49 USC App. §1801, *et seq.* (1992).

[265] Also under the Assistant Chief Counsel for Litigation's control are two other branches which handle Federal Tort Claims litigation.

[266] At the time of the interview, the Chief Counsel was being left out of the loop. The Chief Counsel is a political appointee, and the Clinton Administration had not appointed one to replace the Bush Administration appointee who had left. Since the Acting Chief Counsel is the Deputy Chief Counsel, the administration's chief prosecutor, adjudicative cases were being sent directly from the Assistant Chief Counsel to the Administrator.

[267] 14 CFR §13.202, 13.203 (1993).

(b) Carrier Selection Cases

DOT's international carrier certification cases[268] are routed through the Office of the Secretary.[269] The cases may go first to an ALJ for an evidentiary hearing and initial decision which must be rendered within 150 days.[270] Once the ALJ's decision is announced,[271] the case then goes to DOT's Senior Career Official (SCO).[272] The case is then reviewable by political officials—the

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[268] There are only three or four of these cases a year. They arise when DOT negotiators are able to obtain route authority from foreign governments allowing the DOT to select a carrier to fly between two specified points in each country, or between any of several points in each country. In many instances, DOT enters into bilateral agreements whereby each nation is allowed to select one or two carriers to fly particular routes. Route selection cases also arise when a carrier drops out of a market, thereby relinquishing certain routes, and other carriers ask to have those routes allocated to them.

Since route authority is negotiated on behalf of the U.S., rather than on behalf of individual carriers, DOT must allocate all flying rights. Moreover, given that route rights can be very valuable, carrier selection cases are often hotly contested. The route selection process begins when a carrier submits an application for the route along with conforming applications. In some instances, DOT makes a call for applications. DOT handles these cases in two different ways. In some instances, DOT grants applicants a hearing before DOT's ALJs (the ones located in the Office of Hearings). In most cases, DOT makes a preliminary determination that a route should go to a particular carrier and issues a show cause order asking for reasons why the route(s) should not be granted to that carrier.

[269] The Secretary's authority is an anomaly of history. Originally, carrier selection cases were handled by the Civil Aeronautics Board (CAB). With the CAB's demise, there was some debate about how these cases should be administered. The CAB was an independent regulatory agency, and many were concerned about transferring the lucrative carrier selection cases to an executive branch agency. Some argued that a new independent agency should be created, within DOT, to handle these cases. The Reagan Administration opposed this initiative arguing that, in light of deregulation, it was inappropriate to create a new agency. In compromise, DOT was given authority over these cases. DOT created the "bubble structure" that it currently uses to insulate decisionmakers from political pressure.

[270] The process begins with an Instituting Order which states that DOT either has applications for particular routes or requests applications for those routes. The ALJ consolidates the applications into a single case and hears them together. The cases always involve the carriers competing for the routes. When a case also involves a selection between gateways, the case may include representatives of the affected cities and airport authorities. Carrier selection cases involve many different types of evidence including economic exhibits and rebuttal exhibits.

DOT's General Counsel (GC) participates in carrier selection cases on behalf of the public. As a party to the case, the GC has the right to present and cross-examine witnesses, offer rebuttal material and other evidence relating to the public interest. The GC is asked to perform this function on the assumption that the parties to the case may have interests at odds with the public interest.

Once the parties have a chance to present their cases, the General Counsel files a brief taking a position regarding the awarding of the route(s). The parties are allowed to file responsive briefs. The ALJ then announces his recommended decision, and two weeks later issues his final opinion.

[271] By rule, the ALJs must "announce" their decisions two weeks before issuance. The "announcement" gives the Secretary an extra two weeks to review the case (beyond the statutorily mandated 90 day period which begins when the opinion is issued). 14 CFR §302.1753(c) (1992). After the decision is announced, the parties can file briefs with the SCO commenting on the decision. The briefs are due on the decision's issue date. In this way, the Secretary and SCO have the full 90 days to review the decision. The SCO tries to act within 45 days so that the Secretary also has 45 days within which to act.

[272] At the time of the interview, the SCO was the Deputy Assistant Secretary for International Affairs.

Secretary and then the President. The SCO and the Secretary have 90 days within which to act or the ALJ's decision becomes the agency's final decision.

The SCO's review process involves a review team.[273] The team is supposed to function in a "bubble" meaning that they are insulated from contact with DOT's political officials and their staffs.[274] The SCO can set the case for oral argument. When the SCO completes his opinion, he transmits it to either the Secretary himself or to DOT's Assistant Secretary for Policy. The SCO's decision is not made public. The Secretary, or the Assistant Secretary as the case may be, has only limited authority. He can remand to the Senior Career Official, but he may not select the carrier or direct the SCO to select a particular carrier. The Secretary can remand with a statement of concerns, or with a statement of views on policy and precedent. But the SCO is not bound by either when he issues a new decision. Theoretically, a case can be remanded more than one time provided that the agency issues its final decision within the 90 day timeframe. But remands are relatively rare, and multiple remands are even rarer. At the conclusion of the review process, the case is then sent to the White House for Presidential review. The President can only review a decision for national defense and foreign policy implications.[275]

Most carrier certification cases proceed under an entirely different process. The agency issues an order to show cause why a particular carrier should not be granted the route. This is a tentative decision that is subject to challenge in the proceeding. The show cause procedure was adopted to streamline the review process.[276] The procedure is begun with an Instituting Order, but the case is not heard by an ALJ. Instead, all papers are filed with the Department itself, and the case is decided without an oral hearing. The case is heard without a bubble so that the person who decides the case is free to converse with either the Secretary or the Assistant Secretary. In many instances, the Deputy Assistant Secretary (who is also the SCO) is designated to hear the case. When the Secretary issues a final decision, the case is reviewable by the President.

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[273] The team include GC employees (often policy people) who help draft the opinion, and economic staff who help analyze exhibits.

[274] DOT creates a number of "bubbles" during the process. GC personnel who participate before the ALJ also serve in a "bubble" meaning that they are insulated from others in the GC's office.

[275] At one point, the President had unrestricted review authority. Restrictions were imposed during the Carter Administration.

[276] The Show Cause process is quicker and more efficient, but does have a down side. Cases that are heard by an ALJ are easier to deal with because the ALJ has ruled on admissibility, compiled a record, and rendered an initial decision synthesizing the facts. In the show cause proceeding, the parties are allowed to file information in the public docket room. There are no rulings on the admissibility of evidence. Some of those who were interviewed expressed concerns about the reliability of some of the evidence that is admitted in the show cause proceeding.

3. DOL's OAA

Even though DOL has two review boards, the Secretary reviews some ALJ decisions — in particular "whistleblower" cases, which accounted for 136 of 191 OAA decisions issued in 1992.[277] The Secretary's review is handled by Labor's Office of Administrative Appeals (OAA). OAA is not an appellate board, but rather is an executive office designed to assist the Secretary in the review process. It does not contain AAJs. Rather, it has an Executive Director (who is a political appointee), a Deputy Executive Director, and 11 staff attorneys. They are assisted by two paralegals and four clerical employees.[278]

OAA reports to Labor's Deputy Secretary, and OAA's function is to prepare a legally sound decision for the Deputy Secretary's review. Each case is assigned to a staff attorney who reviews the complete record, and recommends appropriate action. Many appeals are dismissed and therefore can be handled perfunctorily. Some appeals require a decision, and the staff attorney prepares the draft decision which is reviewed within OAA and then forwarded to the Secretary or other deciding official. Under the Bush administration, OAA opinions were reviewed by Labor's Deputy Secretary on the Secretary's behalf.

The review process has fluctuated a great deal depending on the personalities and background of the individuals involved (e.g., whether the Deputy Secretary is a lawyer). If the Deputy Secretary is uncomfortable with the decision, changes are worked out with OAA. Once the decision is satisfactory, it is submitted to the Secretary for review and signature. Whether the Secretary actively reviews these decisions depends on the Secretary. Once the decision is approved and signed, OAA issues it.

4. NRC

The Nuclear Regulatory Commission (NRC)[279] provides, perhaps, the best example of direct agency review.[280] Until 1991, the NRC had an appellate tribunal called the Atomic Safety Licensing and Appeal Panel (ASLAP).[281] ASLAP reviewed decisions of the NRC's trial boards formed from the Atomic Safety and Licensing Board Panel. Appeal Board's decisions constituted final agency action unless they were reviewed by the Commission itself on a discretionary basis.[282]

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[277] DOL also handles some immigration cases - those that arise when an employer certifies that it is unable to fill a job with a qualified U.S. citizen. The employer must first apply to DOL and be turned down. At that point, the case is reviewable by an ALJ. The ALJ will consider whether the case was widely advertised, and whether a qualified U.S. citizen applied.

[278] Labor's Office of Administrative Appeals has 11 staff attorneys who serve at the GS-14 and GS-15 levels. Two staff members were BRB judges who were transferred to OAA. The morale of the staff attorneys has been somewhat up and down. OAA claimed that it was on the "uptick" at the time of the interview. The office has some trouble keeping up with its caseload because all cases must go through political review. The delays caused by such review cause some dissatisfaction. The office claims not to suffer from severe problems such as those suffered by SSA OHA staff attorneys. Some of the cases can be repetitive, but overall there is a good deal of variety.

[279] The NRC is a five-member commission. Its members serve staggered five years terms so that one new commissioner is appointed each year.

[280] The NRC's case load is lower than it was ten years ago. This is due to fewer nuclear reactors cases which tend to be more controversial and complex. Today, agency adjudication focuses mainly on

As of July 1, 1991, the Panel was abolished and the Commission assumed jurisdiction over all appeals.[283] In a few instances, appeal to the Commission is "of right."[284] In most cases, the NRC exercises its jurisdiction on a discretionary basis. The parties to a proceeding can petition for review of a presiding officer's decision.[285] Indeed, agency procedures provide that a petition for review is a necessary step for exhaustion of one's administrative remedies.[286] Alternatively, the Commission can review a decision on its own motion.[287] Under either approach, Commission review is discretionary[288] and can be limited as the

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enforcement cases, amendments to existing licenses, and cases involving other types of users. There are still some cases involving the licensing of reactors and matters relating to older facilities. On balance, adjudication is not now at the heart of the agency's business like it was when the Shoreham and Seabrook cases were pending before the agency (five or ten years ago).

[281] At its largest, the Appeal Panel had nine members and a five-person support staff. The panel was composed primarily of lawyers and rarely had more than two scientists. It sat in three member boards.

[282] However, the NRC retained discretion to review all cases. There was a direct certification process by which the Commission could assume jurisdiction on an interlocutory basis over all or part of a case. There was also a post-decision petition process. As a matter of principle, the Commission was generally not interested in revisiting factual issues which were decided based on a developed record. The NRC retained complete discretion on policy issues. Under the new process, there is no appeal of right and no independent review body. The Commission may still be deferential on factual issues, but there is some uncertainty about whether it will be deferential.

[283] The NRC began phasing out the Appeal Panel in 1990. Under the phase-out arrangement, the Commission itself assumed jurisdiction over any new appeals that were filed. The Appeal Panel retained jurisdiction over all pending appeals.

[284] 10 CFR §2.714a (1992)(dealing with petitions for leave to intervene).

[285] 10 CFR §2.786(a) (1992).

[286] *Id.* at §(b)(1).

[287] *Id.* at §(a).

[288] 10 CFR §2.786(b)(4) (1992):

> The petition for review may be granted in the discretion of the Commission giving due weight to the existence of a substantial question with respect to the following considerations:
>
> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
>
> (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law.
>
> (iii) A substantial and important question of law, policy or discretion has been raised.
>
> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
>
> (v) Any other consideration which the Commission may deem to be in the public interest.

Commission so directs.[289] The Commission also has the authority to accept jurisdiction over questions that are certified to it by presiding officers.[290]

The Commission is assisted in its adjudicative function by the Office of Commission Appellate Adjudication (OCAA).[291] This office, which has a Director and a support staff of three attorneys and two secretaries, performs a variety of functions for the Commission. The NRC describes the office in the following way:

> The Office of Commission Appellate Adjudication reviews administrative proceedings and keeps the Commission advised of decisions that must be made. The office consults directly with the Commission, advising it in formulating opinions and on the discretionary exercise of its supervisory authority over agency adjudication. The office monitors cases pending before licensing boards and associated matters, provides analyses and options to the Commission, and drafts appellate adjudicatory decisions, if necessary.[292]

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[289] 10 CFR §2.786(d) (1992):

If a petition for review is granted, the Commission will issue an order specifying the issues to be reviewed and designating the parties to the review proceeding and direct that appropriate briefs be filed, oral argument be held, or both.

[290] 10 CFR §2.786(g) (1992):

> A question certified to the Commission under §2.718(i) or a ruling referred under §2.730(f) must meet one of the alternative standards in this subsection to merit Commission review. A certified question or referred ruling will be reviewed if it either-
>
> (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
>
> (2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

[291] OCAA reports directly to the Commission. 10 CFR §1.11 (1992).

[292] 10 CFR §1.24 (1992):

> The Office of Commission Appellate Adjudication -
>
> (a) Monitors cases pending before presiding officers;
>
> (b) Provides the Commission with an analysis of any adjudicatory matter requiring a Commission decision (e.g., petitions for review, certified questions, stay requests) including available options;
>
> (c) Drafts any necessary decisions pursuant to the Commission's guidance after presentation of options; and
>
> (d) Consults with the Office of the General Counsel in identifying the options to be presented to the Commission and in drafting the final decision to be presented to the Commission.

OCAA prepares the initial draft of Commission opinions, and works with the Commission to finalize those opinions.[293]

VII. Appellate Structures Compared

The various appellate structures listed above differ in many important respects. This section details some of those differences.

A. Status of Appellate Adjudicators

Most appellate reviewers do not have job security and can be removed at will. This is true of USPS' JO who serves at the Postmaster General's pleasure[294] (although he does have tenure as the AJ Chairman of USPS' BCA[295]). It is also true that USDA's JO serves at the pleasure of his agency's head. The JO believes that he has no tenure in the JO position, and can be moved to a comparable job of equal pay and status without cause. There is nothing in Agriculture's regulations to contradict this view. USDA has never removed a JO. USPS has removed one.[296]

EPA's EAB members are subordinate employees of EPA. Although Board members bear the title Environmental Appeals Judges (EAJs), they do not have tenure protections. If the Administrator becomes dissatisfied with the Board, or the decisions it renders, the Administrator can change the Board's composition. SSA's AC AAJs also lack tenure, and do not have statutory protections like those accorded to ALJs.

Labor's review boards seem to have little job security as well. Labor's WAB members receive limited appointments. The Chairman's appointment is for three years while regular board members receive two-year appointments. During the Carter Administration, the WAB was dismissed and replaced by new members. BRB members have also been dismissed. In *Kalaris v. Donovan*,[297] former BRB members sought to challenge their dismissal as board members (they were transferred to other jobs within DOL). The D.C. Circuit upheld the dismissals rejecting Board members' claims that they could only be dismissed for cause. The court held that, "in the face of congressional silence all inferior officers of the United States serve at the discretion of their appointing officer."[298] Recently, the BRB's Chairman was transferred to other duties outside the BRB.

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[293] 10 CFR §1.24(d) (1992).

[294] 39 CFR §221.8(a) (1992): Officers serve at the pleasure of the Postmaster General. The following officers are appointed by the Postmaster General: ... (7) The Judicial Officer....;" *see also* 39 USC §203 (1988).

[295] 41 USC §607(b)(1) (1992): "Except as provided in paragraph (2), the members of agency boards shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3015, Title 5, ..."

[296] N.Y. Times at 2 (March 7, 1960) ("The judicial officer of the Post Office Department, who decides whether mailed matter is obscene, has been dismissed because he did not judge to the liking of Arthur Summerfield, the Postmaster General.").

[297] 697 F.2d 376 (D.C. Cir. 1983).

Only a few appellate reviewers have job security. For example, members of Interior's BCA cannot be fired except for cause.[299] FAA's Deputy Assistant Secretary is a career official and has job protections. However, he has no protections in the Deputy Assistant Secretary position.

B. Performance Reviews

Agencies also differ regarding whether they subject appellate reviewers to performance evaluations. At DOI, most AJs are reviewed on an annual basis. The Chief Judge of each Board reviews members of their boards. The Director of OHA reviews each Chairman. The review process is fairly simple. One Chief AJ stated that the forms are so bland that it would be difficult to take any personnel action based on them.

DOI's BCA is also subject to performance reviews.[300] The review is not supposed to focus on the content of an AJ's decisions, but the Chairman is responsible for ensuring the quality and consistency of IBCA opinions. The Chairman reviews AJ decisions to determine how well they are written and whether the judge acted consistently with precedent. To the extent that the members have had serious disagreements about particular cases, those disagreements are generally resolved as decisions are written. But, when a judge is too independent minded, and tends to write decisions based on what the judge thinks the law ought to be rather than what it is, then that judge will be rated lower.[301]

SSA's AC members are also subject to performance reviews, and they work under a merit pay system. The review is conducted by the Deputy Chair and is an impressional review based on a sampling of the AAJ's decisions. The reviews do not focus on the number of grants or denials, or whether the AAJ handled a particular case in a particular way. Rather, they focus on the judge's ability to handle an adequate number of cases, as well as on the quality of the judge's writing and decisionmaking. DOT's Deputy Assistant Secretary is a career employee, and therefore is also subject to performance reviews.

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[298] *Id.* at 381.

[299] The former Chairman stated that, although board members have the same protections accorded to ALJs, board members sometimes resign due to peer pressure if they are unable to function in a collegial environment.

[300] The Director reviews each Board chairman. One chairman stated that the process is relatively arbitrary. This chairman stated that some prior Directors have refused to meet with the Chairmen or to provide them with any meaningful evaluation even though conferences are mandatory. The evaluations have not always been timely.

[301] The IBLA handles performance reviews similarly. When the Director reviews the Chairman, he is specifically precluded from considering the Chairman's decisional content. Likewise, when the Chairman review individuals AJs, he claims that he does not focus on decisional content. Instead, he focuses on how well AJs are managing their dockets and their ability to act collegially.

The Chairman stated that he tries to respect the independence of board members.

At some agencies, appellate reviewers are not subject to performance reviews at least regarding the merits of their decisions. This is true for both the Chairman and for members of the FCC's Review Board. Since board members are career employees, they could perhaps be subjected to such reviews. However, FCC has never tried to impose them. The Board does submit annual reports to the Commission. In addition, in response to complaints, the Chairman has the authority to report judges who are rude to parties or who unduly interrupt proceedings. However, no complaints have been received, and the Chairman has never found it necessary to exercise this authority.

C. Decisional Independence

Most appellate judges — be they JOs, Directors or AAJs — claim to have decisional independence.[302] Admittedly, most appellate reviewers lack tenure protections, and have limited or non-existent guarantees of independence. In addition, many AAJs are subject to performance reviews. Nevertheless, few appellate judges complained about a lack of independence. All appellate judges — be they AAJs, directors or JOs — claimed that their agencies do not attempt to interfere with their decisionmaking processes.

USDA is one of the few agencies whose head has tried to interfere in the decisionmaking process. In *Utica Packing Co. v. Block*,[303] the Secretary of Agriculture "violently disagreed" with the JO's decision in an administrative appeal, and appointed a second JO "to improve the Department's chances of winning a petition for reconsideration."[304] The Sixth Circuit overturned the Secretary's order, and ordered the agency to reinstate the JO's original decision.[305]

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[302] When EPA had the JO system, the JOs generally functioned in an independent manner. However, the JOs were not completely independent. In some instances, the JOs would discuss pending cases with the Administrator, or with those on the Administrator's staff. The purpose of these discussions was to make the Administrator aware of important issues. Such discussions occurred relatively infrequently—perhaps a couple of times a year.

[303] 781 F.2d 71 (1986).

[304] *Id.* at 74.

[305] The Court concluded that:

> Every disappointed litigant would doubtless like to replace a judge who in the regular course of his or her duties has decided a case against the litigant and present a motion for a new trial or for reconsideration to a different judge of his own choosing.

The problems encountered in *Utica Packing* are aberrational. After that decision, the Secretary could have removed the JO and prevented him from deciding future cases. The Secretary did not do so. Moreover, even though the JO reports to USDA's Secretary and Deputy Secretary (except on administrative matters which he reports to USDA's Assistant Secretary for Administration for administrative matters), the JO claims to have decisional independence. The Secretary provides input only through the adversary process, and does not discuss or try to influence pending cases. The ALJs stated that their sense was that the JO did, in fact, act independently. However, some of the ALJs believe that the JO has a prosecutor's bias so that the agency has little reason to interfere with his work.

Most other appellate review boards claimed to act independently as well. Claims of independence were recorded by SSA's AC,[306] FCC's Review Board, DOL's BRB[307] and WAB,[308] DOI's IBCA[309] and IBIA,[310] and USPS. The WAB's claims are interesting. WAB members believe that they serve at the Secretary of Labor's pleasure. Indeed, within the last two decades, the Secretary has dismissed members of both the WAB and the BRB. Moreover, Board members are appointed only for limited terms. Nevertheless, Board members flatly stated that they have decisional independence.

Some ALJs were skeptical about whether AJ review boards and JOs really do function independently. One ALJ remarked that, even if SSA's AC was subject to undue influence, the AJs would never admit it. But the interviews did not suggest that these concerns were well-founded. Agency officials may have the opportunity to interfere with AJ decisional independence. For example, DOI's Director is a political appointee who has no tenure protections, and he reviews the performance of the IBLA's Chairman. Moreover, the Director is an

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> All notions of judicial impartiality would be abandoned if such a procedure were permitted.

Id. at 77.

[306] OHA receives a large number of communications from Congress, but OHA has a separate section (the Division of Congressional Inquiries) which handles inquiries. OHA denies that congressional pressure or inquiries ever influences its decisions. The Division of Congressional Inquiries usually writes to the inquiring congressmen stating that a matter is pending before the AC, and then sends a follow-up letter when the case is decided. If SSA policymakers do not like what the AC is doing, the Secretary can alter the agency regulations or rulings.

[307] The Secretary takes a hands-off approach except that the Secretary issues regulations.

[308] WAB members stated that they function independently, and that the Secretary has never attempted to influence their decisionmaking except through the adversarial process.

[309] The IBCA's former Chairman claimed that he suffered through a lousy relationship with one prior director. This Chairman stated that the board should report directly to the Secretary. He did not complain about directorial interference in Board decisions, but only about friction between himself and the Director. He also complained about inadequate resources.

[310] An IBIA member stated that, since the Board's creation in 1971, no Board member has ever been dismissed.

ex-officio member of the IBLA even though past and present Directors rarely sit on the Board.[311] But there is little reason for the Director to interfere with the IBLA's independence. If the Director wishes to do so, he can assume jurisdiction over a case and remove it from the IBLA altogether.[312] Moreover, to the extent that the Director is unhappy with an IBLA decision, he can review and overturn that decision.

D. Policy Input

Agencies vary considerably regarding how the agency head provides policy input into the adjudicative process.[313] At the FCC, the Commission reviews policy issues itself and prohibits the Review Board from making policy. If a policy issue arises in a case before the Board, the Board must certify that issue to the Commission. At agencies where the agency head reviews adjudicative decisions, the agency head provides such input through its decisions.

At a number of agencies, appellate adjudicators decide cases with no direct input from the agency head. For example, at USDA, the Secretary does not review the JO's decisions and the two do not discuss policy issues. The Secretary participates in the JO's proceedings only as an adversary. To the extent that the JO is confronted by a regulatory gap that requires some policymaking, the JO fills in the gap by rendering his interpretation of the regulatory scheme.

The same situation exists at other agencies. USPS' JO, SSA's AC and the IBCA[314] claimed to function independently on policy matters. If SSA's Commissioner is unhappy with the AC's interpretations, the Commissioner does not consult with the AC. Instead, the Commissioner may issue a Social Security ruling or a new regulation. AC members stated that they try to be responsive to agency policy statements.[315]

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[311] When Directors have served on panels, they have generally tried to avoid cases with controversial issues.

[312] 40 CFR §4.5 (1992).

[313] Most intermediate review boards have only limited contact with the agency head. For example, the Chairman of the FCC's Review Board reports to the FCC's chairman on a yearly basis. The Chairman's report generally focuses on whether the Review Board is getting its work out in a timely fashion, and is a pro forma statistical report. The report is sent to the FCC's Managing Director who transmits it to the Chairman who signs the report and sends it back.

The situation is roughly the same at the NRC. However, OCAA's Director works directly for the Chairman The Director briefs the Chairman about important issues, as well as about staffing and caseload issues.

[314] DOI attorneys appear before the Board, but they do so only in an adversarial capacity.

[315] USPS' JO believes that his function is to insure that the agency's decisions are consistent. The JO receives no policy input from the Postmaster General other than through the adversary process. The JO claims that he follows agency policies set forth in manuals and published documents. He does make law in light of his perception of what the governing statute and regulations require, but he tries to avoid making

Some appellate reviewers can consult with the agency head on policy issues. For example, USPS' JO has the right to refer matters to the Postmaster General for decision. He has never exercised that authority.[316] Likewise, the EAB has the power to refer cases to the Administrator for final decision,[317] and it has never used its power.[318] In addition, when only two Board members are available to review a decision, and the two members disagree about how the case should be decided, the case must be referred to the Administrator for a final decision.

E. Finality

Agencies differ significantly regarding the effect they give to appellate reviewers' decisions. In most instances, when a single individual (i.e., a JO or CAHO) conduct's the review, that individual's decisions constitute final agency action. This is true for decisions by USDA's JO,[319] as well as USPS' JO.[320]

Among those agencies that have review boards, the decisions of some boards constitute final agency action. At Labor, decisions of the BRB and WAB constitute final agency action. The same is true for EPA's EAB and SSA's AC. An aggrieved party can ask the AC to reconsider a decision en banc, and also has recourse to the courts,[321] but cannot appeal to the Commissioner.

Some agencies that have review boards allow the agency to discretionarily review board decisions. This is true at the FCC, and at Interior (except for decisions of the IBCA).[322] Under DOI regulations, both the Secretary and OHA's Director can review Board decisions. In addition, they can assume jurisdiction of any case.

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policy to the extent that he can. If the Postmaster does not like the JO's interpretation, he can alter that interpretation by changing its regulations.

[316] The JO believes that the Postmaster General expects him to decide the cases without consultation, and he does.

[317] 57 Fed. Reg. 5324 (1992) ("This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring any case or motion governed by this part to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so.").

[318] If the Board ever does refer a case it is required to notify the parties to the case. *Id.*

[319] *See* Utica Packing Co. v. Block, 697 F.2d 376 (D.C. Cir. 1983).

[320] 39 CFR §226.2(e)(1)(ii) (1992).

[321] At the time of the interview, the federal courts were reviewing somewhere between 9,000 and 10,000 OHA decisions (including ALJ decisions). A reviewing court is supposed to engage in record review, and can remand, enforce, or reverse. Most AC decisions are affirmed (the AC claims that the affirmance rate is about 70%). However, during the 1980s, the federal courts remanded a significant number of cases.

[322] 43 CFR §4.5(b) (1992).

F. Salary Levels

Appellate reviewers also vary significantly regarding their compensation. Most members of review boards and JOs serve at SES levels as the following chart demonstrates:

Agency	Position	Salary Level
EPA	EAB Members	SES V
FCC	Review Board Members	SES IV[323]
USDA	JO	Senior Level[324]
DOI	IBLA Members	Senior Level
DOI	IBIA Members	Senior Level
DOL	BRB Members	Senior Level
DOL	WAB Members	GS-15
USPS	JO	Executive Schedule[325]
EOIR	CAHO	SES IV

In those agencies that do not have JOs or review boards, but instead have agency review with the assistance of staff attorneys, the staff attorneys are generally paid far less than JOs or review board members.

Agency	Position	Salary Level
NRC	Director, OCAA	SES IV
NRC	Staff Attorneys	GS 11-15[326]
DOL	Director, OAA	SES[327]
DOL	Staff Attorneys	GS-14 & 15
DOT	Deputy Asst Secretary	SES V
DOT	Bubble Personnel	GS-11 to 15[328]
FAA	Office of Chief	GS-13 to 15[329]

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[323] At the time of the interview, Board members were making slightly more than $100,000.

[324] He is the equivalent of an SES V. For some time, the JO was concerned about his salary which was low in relation to equivalent personnel at other agencies. The situation has now been rectified.

[325] The JO is entitled to a 4 by virtue of his position as BCA Chairman. Executive Schedule 4 is roughly equivalent to SES VI.

[326] There are three staff attorneys. One is a GS-11, the second is a GS-14, and the third is a GS-15. The Director likes to have staff attorneys with a mix of experience and grade levels.

[327] At the time of the interview, OAA had an acting director.

[328] A bubble might include a number of different people. For example, the Deputy Assistant General Counsel for International Law usually serves in the bubble, and he is a GS-15. The bubble may also include a couple of staff members (GS-12 to GS-15), an analyst with technical knowledge (GS-12 to GS-15), and a low-level staff person (GS-11).

[329] The Assistant Counsel serves at the SES level.

G. Separation of Functions

None of the agencies studied suffer from separation of functions problems. Virtually all agencies have separation of functions regulations. At some agencies, appellate reviewers are allowed to consult with those outside their offices. For example, NRC's OCAA sometimes consults with technical people since it does not have such personnel on its own staff. But when OCAA does so, the technical people have no connection to the litigation, and are designated as adjudicatory employees for purposes of the case.[330] OCAA notifies all parties that it intends to consult technical people.

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[330] The NRC has fairly strict separation of function regulations:

> (a) In any proceeding under this subpart, any NRC officer or employee engaged in the performance of any investigative or litigating function in that proceeding or in a factually related proceeding may not participate in or advise a Commission adjudicatory employee about the initial or final decision on any disputed issue in that proceeding, except-
>
> (1) As witness or counsel in the proceeding;
>
> (2) Through a written communication served on all parties and made on the record of the proceeding; or
>
> (3) Through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.
>
> (b) The prohibition in paragraph (a) of this section does not apply to-
>
> (1) Communications to or from any Commission adjudicatory employee regarding-
>
> (i) The status of a proceeding;
>
> (ii) Matters with regard to which the communications specifically are permitted by statute or regulation;
>
> (iii) Agency participation in matters pending before a court or another agency; or
>
> (iv) Generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated with resolution of any proceeding under this subpart pending before the NRC.
>
> (2) Communications to or from Commissioners, members of their personal staffs. Commission adjudicatory employees in the Office of the General Counsel, and the Secretary and employees of the Office of the Secretary, regarding-
>
> (i) Initiation or direction of an investigation or initiation of an enforcement proceeding;
>
> (ii) Supervision of agency staff to ensure compliance with the general policies and procedures of the agency;
>
> (iii) Staff priorities and schedules or the allocation of agency resources; or
>
> (iv) General regulatory, scientific, or engineering principles that are useful for an understanding of the issues in a proceeding and are not contested in the proceeding.
>
> (3) None of the communications permitted by paragraph (b)(2) (i) through (iii) of this section is to be associated by the Commission adjudicatory employee or the NRC officer or employee performing investigative or litigating functions with the resolution of any proceeding under this subpart pending before the NRC.
>
> (4) Any Commission adjudicatory employee who receives a communication prohibited under paragraph (a) of this section shall ensure that it and any responses to the communication are placed in the public record of the proceeding and served on the

NRC's OCAA works for NRC's commissioners. They also consult with the Division of Legal Counsel, Legislation and Special Projects of NRC's General Counsel's office. This division of OGC, which is separated from other GC personnel who represent the agency staff in administrative licensing and enforcement proceedings, advises the Commission and OCAA on adjudicative matters.

The EAB is "walled-off" from the EPA's enforcement sections. The EAB may consult with EPA employees provided that such consultation does not violate the agency's prohibition against ex parte contacts.[331] Board members cannot be employed by "the Office of Enforcement, the Office of the General Counsel, a Regional Office, or any other office directly associated with matters that could come before" the EAB,[332] and they must recuse themselves from any case in which "they performed prosecutorial or investigative functions with respect to the case, participated in the preparation or presentation of evidence in the case, or were otherwise personally involved in the case" in their previous employment.[333]

> parties. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.
>
> (d) (1) The prohibitions in this section apply-
>
> (i) When a notice of hearing or other comparable order is issued in accordance with §§2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703.
>
> (ii) Whenever an NRC officer or employee who is or has reasonable cause to believe he or she will be engaged in the performance of an investigative or litigating function or a Commission adjudicatory employee has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.703.
>
> (2) The prohibitions of this section will cease to apply to the disputed issues pertinent to a full or partial initial decision when, in accordance with §2.786, the time has expired for Commission review of the decision.
>
> (e) Communications to, from, and between Commission adjudicatory employees not prohibited by this section may not serve as a conduit for a communication that would otherwise be prohibited by this section or for an ex parte communication that otherwise would be prohibited by §2.780.
>
> (f) If an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing a petition for review of an initial decision, or a petition for reconsideration of a final decision that clearly and concisely sets forth the information or argument relied on to show the contrary. If appropriate, a party may be afforded the opportunity for cross-examination or to present rebuttal evidence.

10 CFR §2.781 (1993).

[331] 57 Fed. Reg. 5323 (1992).

[332] *Id.*

[333] *Id.*

Other agencies have similar provisions. For example, the FCC's Review Board is precluded from discussing the merits of a case even with Commission members.[334]

H. Scope of Review of ALJ Decisions

The scope of appellate review of ALJ decisions varies significantly from agency to agency. At many agencies, appellate review is primarily limited to legal issues,[335] and appellate reviewers tend to be deferential on factual findings. DOL's WAB provides an example of this approach. DOL ALJs believe that the WAB regards itself as the final authority on policy issues, but defers to ALJs on factual issues. When the WAB is concerned about an ALJ's factual findings, it tends to remand. Likewise, although EPA's EAB will review factual findings in ALJ decided permit cases, the EAB will usually defer to the ALJs.[336] Limited review is also exercised by the FCC's Review Board,[337] USDA's JO,[338] DOI's IBCA,[339] EPA's EAB,[340] NOAA,[341] and DOT officials.[342]

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[334] 47 CFR §0.361(b) (1992). The WAB is also separated from other sections of the Labor Department. Board members claim that they keep those sections at arms length. The Board's Executive Secretary handles case scheduling and other routine contacts with parties.

[335] *See, e.g.*, 43 CFR §4.24(a)(2) (1992).

[336] The EAB uses different procedures in different cases. In penalty cases, the Board uses a standard judicial model. After an appeal is filed, the parties are allowed to submit briefs. The EAB then renders its decision.

In permit cases, the regulations require a Petition for Review. The EAB has discretion to deny the Petition, and will do so unless the Petitioner demonstrates clear error. Although denials are not uncommon, they are usually accompanied by a detailed explanation. The Board usually asks the permit issuer to respond to the petition. Once the response is filed, the Board then decides whether to grant or deny review. If granted, the Board follows a normal judicial model. In some instances, the EAB remands the case to the permit issuer for further consideration or for changes.

[337] The FCC Review Board claims that it defers to ALJ decisions on factual issues involving credibility, but will substitute its judgment on questions of law. The Board flatly states that it exercises *de novo* review on quasi-policy issues (the Board is precluded from hearing or resolving policy issues). These issues are often sophisticated, and there is considerable room for disagreement. The Board follows rather strict procedures in comparative cases. These procedures are designed to insure fairness to competing applicants.

[338] The JO claims that he gives great deference to the ALJs on factual issues since the ALJs actually see the witnesses. He gives them no deference on policy issues. The JO reverses the ALJs about a third of the time. He rarely remands even though it requires less work since the JO has to write an elaborate justification when he reverses. About 10% of the JO's decisions are reversed in the courts.

The ALJs have a somewhat different view of the JO's review. In their opinion, the JO engages in "pretty expansive review." The ALJs felt, even though the JO does not actually review their credibility decisions, the JO sometimes overrules them through the use of inferences.

The ALJs do not like the JO's sanction decisions. They feel that he routinely overrules them on sanctions issues, and that he often imposes the maximum fine. They believe that he does not impose a fine under $375

[339] The IBCA can review ALJ decisions on its own motion. Generally, review is based on legal as opposed to factual issues. If there are serious factual disputes, the IBCA refers the case back to the hearing division.

Appellate review is not always deferential. USPS' JO reviews ALJ determinations from both a factual and a legal perspective. On legal issues, the JO feels free to substitute his judgment for that of the ALJ. In addition, the JO does not defer on factual issues except when the ALJ's determinations are supported by a preponderance of evidence. The JO does give some deference to the ALJ on credibility issues since the ALJ observed the witness. Interestingly, despite the preponderance of the evidence standard, USPS' former ALJ expressed no reservations about the scope of review. He indicated that, in most instances, his factual findings are sustained by the JO.[343]

ALJs did complain, rather bitterly, about the scope of review exercised by two appellate reviewers: DOL's OAA and SSA's AC.[344] Some DOL ALJs complained that even though OAA is statutorily bound to apply a substantial evidence test on factual issues, the actual scope of review is much less deferential.[345] DOL ALJs complain that OAA reviews not only those issues that

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[340] EPA's ALJs did not complain about the level of reversals or remands from the EAB. The EAB is not deferential to the ALJs on legal issues. Some reversals are to be expected given that the agency is confronted by many new statutory and regulatory provisions involving novel legal issues. The ALJs expressed concern only about the EAB's penalty policy. As a general rule, the ALJs are not concerned about reversals on legal grounds, and expressed no concerns about EAB remand levels.

[341] According to Commerce's ALJ, although NOAA's Executive Office engages in both factual and legal review, it is often very deferential on factual issues. The Executive Office does not often reverse the ALJ's policy determinations except when penalties are involved. The Administrator tends to reduce the penalties. Nevertheless, the ALJ stated that his relations with NOAA are quite good.

The ALJ stated that Commerce's Bureau of Export Administration (BXA) does get involved in reviewing policy decisions. The ALJ felt that the BXA should get more involved, at least to the extent of setting agency policy, although the ALJ felt that the BXA was correctly deferential on factual issues. The BXA's program is not given attention since the statute has expired, and the agency is being continued only by virtue of a Presidential order.

[342] ALJ decisions are reviewed by many different agencies, and the scope of review varies somewhat from agency to agency. For example, the FAA reviews only a small percentage of ALJ decisions, but the ALJs decide a large number of FAA cases. Of the FAA cases that are reviewed, the ALJs are upheld most of the time. The Administrator is usually fairly deferential on factual issues, and reversals are usually based on policy grounds, especially in civil penalty cases where the Administrator will sometimes reverse when the Administrator wants to impose a more severe penalty. There are few other areas where the ALJs strongly disagree with the Administrator. As a general rule, ALJ decisions are well respected.

[343] USPS former ALJ stated that he has no concerns about the scope of the JO's review. He claimed that the JO generally accepts his factual determinations, but will sometimes reverse when legal issues are involved. Some policy reversals are to be expected since the agency is working with some new statutes, and there are a number of unresolved questions. In general, the JO is expected to apply a preponderance of the evidence standard except in mail dispute cases. The JO himself stated that he reviews even the ALJ's factual findings, but that he tends to be deferential on credibility issues. The former ALJ stated that the JO "does very high quality work," and the ALJ expressed respect for the JO.

[344] Some ALJs also complained about the BRB. These ALJs believe that, although the BRB purports to apply a substantial evidence standard, it is not actually deferential. Some ALJs claim that the undeferential nature of the BRB's review is revealed by the fact that, even though it has an extremely large staff, it has trouble keeping up with its caseload.

[345] One ALJ believes that OAA's staff attorneys function under a promotion ladder which rewards remands as opposed to affirmances or reversals. This ALJ claimed that OAA sometimes remands cases for

are appealed, but all of the issues in the case. Labor's boards tend to be more deferential.[346]

SSA's AC has been subjected to much criticism for its review process. SSA ALJs complain that the AC lacks uniformity and consistency in its decisionmaking. They also complain that the AC decisions are often based on what the AC thinks a federal court might do with the case.

The AC applies a substantial evidence standard on factual issues,[347] and can only admit new evidence in limited situations.[348] However, it must consider new evidence in some situations.[349] Over 90% of the AC's cases involve disability claims, and the nature and severity of an impairment can change over time (unlike many of the issues raised in retirement and survivors cases, which remain static). Some impairments worsen, and new impairments arise. As a result, it is difficult for the record to remain closed. If a claimant's condition worsens or new medical information is submitted, that relates to a time period which could affect the AC's findings, the AC considers this information. It can reverse and issue a favorable decision, or it can do what the AC often does: remand to allow the ALJ to consider the new evidence in conjunction with the other evidence, and to decide whether it affects the outcome.[350] Many ALJs believe that the AC remands unnecessarily merely to keep cases out of the federal courts. The AC claims that, in its effort to ensure that the Secretary's final decisions are legally

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"cockeyed" reasons. OAA disputes this assessment claiming that, in a given month, OAA will issue about 15 final dispositions, and only one or two of those involve remands.

[346] The BRB claims that most cases (particularly Black Lung cases) are affirmed, and that very few are remanded. The BRB noted that, in November, 1991, it decided 190 Black Lung and 275 Longshore cases. Of these, only 31 Black Lung and eight Longshore cases were not affirmed.

[347] The Appeals Council will review a case if-

> (1) There appears to be an abuse of discretion by the administrative law judge;
>
> (2) There is an error of law;
>
> (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or
>
> (4) There is a broad policy or procedural issue that may affect the general public interest.

20 CFR §404.970(a) (1992).

[348] By statute, the AC can only consider new evidence in the following situation:

> If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

20 CFR 404.970(b) (1992).

[349] 20 CFR §404.970(d) (1992).

[350] Remands are authorized under 20 CFR §404.977(a) (1992).

sufficient, and factually and legally supportable, it often has no choice but to reverse or remand a claim.

I. Prior Experience of Appellate Reviewers

Appellate reviewers tend to have different levels of prior experience with significant differences between some reviewers (those who serve on Boards or as independent reviewers with decisional authority—e.g., USPS' JO and USDA's JO) from others (those who prepare draft decisions for the agency's decisionmaker— e.g., DOL's OAA).

Board members and independent reviewers often have substantial experience, some of it judicial. USPS' JO served as an AJ for the Armed Services BCA before he accepted the job at USPS. Prior to his service on the BCA, he was in private practice (he did not hear USPS cases). USDA's JO is not an ALJ, but rather is a lawyer who formerly worked in USDA's General Counsel's office from 1949 to 1962. At one point, he served as Director of the Packers and Stockyards Division, and later as Administrator when the Division was changed to an Administration.

J. Backlogs

Many appellate review bodies have a significant backlog of pending cases. These backlogs seem to exist whether or not the agency uses the JO system, has an appellate review board, or has direct agency review. For example, at the date of the interview, SSA's AC had 14,000 unworked cases, as well as 2,500 cases that had been worked but that have not yet been released.

A few appellate bodies are relatively current with their caseloads. The WAB was changed to a full-time board in July 1992. At that time, the Board had a backlog of 97 cases that developed while the Board was operating with part-time members. During the 1991 fiscal year, the WAB closed 117 cases or about 25% of the entire number of cases closed during the Board's entire history. At the present time, the Board tries to decide cases within 90 days.[351]

The BRB appears to have fairly serious backlog problems. These problems were so serious that Labor's Inspector General (IG) was asked to review the

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[351] Many cases are "pass through" cases that do not require a great deal of time or effort to decide, but some cases are quite involved. Nevertheless, the WAB operates on what it refers to as a "Rocket Docket" because it tries to get decisions out within 90 days. The WAB is not always able to meet this deadline. Indeed, some of its cases are seven or eight years old. In most instances, the delays are due to factors beyond the WAB's control (e.g., a case is being held in abeyance).

BRB's functions and procedures.[352] The IG ultimately issued a highly critical report.[353] Symptomatic of the BRB's problems is that, even though many review boards consider a case to be backlogged after six months, and some feel that it is highly undesirable to delay a decision for more than nine months, the BRB routinely takes more than a year to decide a case. While there can be many reasons for backlogs,[354] the BRB's problems appear to stem from a number of problems including its procedures,[355] its allocation of personnel[356] and its expectations from those personnel.[357] Some BRB AAJs claimed that their problems are also due to the poor quality of ALJ decisions. Since the interview, the BRB has been working to address its problems.

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[352] U.S. Department of Labor, Office of Inspector General, Benefits Review Board Organizational and Management Review (Nov. 13, 1992)(hereafter *Inspector General's Report*); *see also* Legal Times 1, 18-19 (Jan. 25, 1993).

[353] *Inspect General's Report, supra* note 352. The BRB's problems may be at least partially due to inefficient staff utilization. At the time of the interview, the BRB had 46 FTEs allocated to its docket section. The former Deputy Secretary of Labor stated that there is no justification for having so many people in this section. He also stated that, had he stayed around, he would have reduced the size of the section. The BRB problems may also be due to bickering between BRB managers and union officials.

[354] Backlogs can be attributable to uncertainty in the law. The BRB deals with novel issues (the BRB claims that up to 50% of its cases involve novel or complex issues) that take more time to decide. BRB staff claimed that the Board at times must stay cases because the federal circuits disagree about important issues and the BRB must wait for the Supreme Court to resolve the disagreement. Once the Court renders its decision, the Board can sometimes issue a large number of decisions very quickly. One AAJ disagreed: "We do not await Supreme Court decisions. If we did, given the number of splits in the circuits, no cases would be decided here."

[355] A case is not assigned to a staff attorney until the file is complete (it contains the full record, briefs, etc.). But completion of the file can take six to nine months. Prior to 1990, when the BRB granted extensions of time more liberally than it does now, completion could take much longer. At present, the initial brief must be filed within 30 days, the response within 30 days, and a further reply within 20 more. But, if any of the parties request an extension of time, the extension is routinely granted for an additional 30 days. Moreover it takes the BRB 2-3 weeks to rule on a request for extension (the BRB indicated that this 2-3 week period represents a significant improvement over the BRB's prior response time), and this time period is not included in the 30 day extension. As a result, a party might be granted 2 1/2 to 3 months to file a brief, and other parties might be granted similar extensions. Thus, 8-9 months can elapse before a file is complete and can be assigned to a staff attorney.

[356] At the time of the interview, the BRB had 65 1/2 FTEs assigned to its docket section (Executive Counsel or EC), but only 55 non-supervisory staff attorneys assigned to OGC. Given that OGC has the primary responsibility for reviewing the case record and writing draft opinions, while the docket section handles only routine procedural matters and completion of file matters, this allocation of personnel seems out of balance.

The head of the EC claims that it is important to see the case production process as a total system, and that the EC performs a number of functions that are time consuming and would drain staff attorney time (e.g., making sure that a file is complete and requesting necessary documents). While these functions may be time consuming, it is difficult to believe that the EC needs to have 65 people performing these functions. The files are supposed to be complete when the district director sends them to the BRB.

The unusual size of the BRB's Executive Counsel (Docket Section) is highlighted by a comparison with the IBLA's docket section which has only ***one*** person. Admittedly, the BRB processes more cases (about 3.5 times as many), but the difference in the size of the two docket sections is far in excess of the difference in the size of their dockets.

[357] Within OGC, case production standards seem to be low. Even though Labor's ALJs generally decide between six and eight Black Lung cases per month, and as many as 14 or 15 when they have clerks available to them, the BRB's staff attorneys are expected to issue recommended decisions in four Black

Within Labor, OAA also has serious backlog problems. On May 19, 1993, Labor's Inspector General issued a final report that was highly critical of OAA as well.[358] The report concluded that "OAA had served as a burial ground for cases on which the Secretary and other Departmental officials did not issue a final decision."[359] OAA's 26 oldest cases had been pending for an average of 7.5 years, and it has an overall backlog of 178 cases that have been pending for an average of 2.5 years.[360] The report concluded that "[t]here is no standard of timeliness for OAA's case processing."[361] Under the Secretary's directive, OAA is taking steps to issue decisions in its 26 oldest cases.[362]

Lung or three Longshore cases per month. The ALJs must initially try the cases and put the record together, but they decide far more cases than the BRB's staff attorneys who are only expected to engage in record review. In Longshore cases, BRB staff attorneys are expected to decide only three cases per month. One BRB AAJ summarized the situation as follows: "It is true that attorney production standards need to be increased and improved and this will necessitate union cooperation."

[358] U.S. Department of Labor, Audit of the Office of Administrative Appeals, Final Rep. # 17-93-009-01-010 (May 19, 1993)(hereafter *Second IG Report*).

[359] *Id.*, Executive Summary, at 1.

[360] *Id.*

[361] *Id.*

[362] FAX from Mr. Gresham Smith, Acting Director, OAA to author (Aug. 23, 1993):

> You have asked about action taken in response to the report of the Office of the Inspector General, "Audit of the Office of the Administrative Appeals," Report No. 17-93-009-01-010, dated May 19, 1993.
>
> As a result of the OIG report, the Secretary has directed our office to develop an Action Plan for disposing of the 23 cases identified as the oldest pending in OAA. (The OIG report listed 26 cases, but by the time the report was issued three of those had been completed.) The Action Plan sets target dates for the completion of these cases. The last completion target date is September 30, 1993. At this time a slight majority of these cases have been completed. In addition, a policy has been established of working on the oldest cases first, with few exceptions. Those exceptions include priority for cases with statutory deadlines and approvals of settlements, which rarely take much time for disposition.

Agency	**Board**	**Yearly Dispositions**	**Backlog**
DOI	IBCA	300	400
DOI	IBLA	528	788[363]
DOI	IBIA	150-200	100[364]
USDA	JO	40-60[365]	15-20[366]
DOL	WAB	65-80[367]	current
DOL	OAA	197	178[368]
DOL	BRB	2,700	*[369]
FAA	OCC	*[370]	0[371]
EPA	EAB	163	*[372]

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[363] The following chart describes the IBLA's case load for the last seven years:

Fiscal Year	**Cases at Beginning**	**Cases Rec'd**	**Cases Disposed**	**Cases at End**	**<**
1993	816	237	278	775	326
1992	678	666	528	816	340
1991	731	514	567	678	297
1990	793	598	660	731	267
1989	911	735	853	793	374
1988	1008	737	834	911	484
1987	1829	866	1008	1008	474

The IBLA requires an average of 13.9 months to decide a case. Of this period, 4.3 months are spent waiting for all necessary documents to arrive, and nine months are required for case decision. At the date of the interview, the IBLA had received about 85 appeals during the 1993 fiscal year. The current backlog involves some cases which arrived at the Board during the years 1988 to 1990.

[364] The IBIA claims to be relatively current. It tries to decide cases within six months although it does have some cases that are more than six months old. At the end of FY 1992, the IBIA's situation was as follows:

Pending (Start FY)	**Docketed (During FY)**	**Decided (During FY)**
83	234	197

[365] The JO decided the following number of cases between 1978 and 1992:

Fiscal Year	**No.**	**Fiscal Year**	**No.**
1978	25	1986	42
1979	26	1987	36
1980	21	1988	40
1981	29	1989	43
1982	33	1990	42
1983	34	1991	56
1984	26	1992	62
1985	50		

The JO had the following intervals between ALJ and JO decisions:

Fiscal Year	**Median Interval**	**Longest Interval**	**Number of Cases Over 7 Months**	**Number of Cases Over 12 Months**
1985	2 mo. 3 wk.	8 mo. 1 wk.	2	0
1986	3 mo. 2 wk.	11 mo.	6	0
1987	6 mo. 2 wk.	20 mo. 1 wk.	8	1
1988	8 mo. 3 wk.	20 mo. 3 wk.	17	8
1989	9 mo. 1 wk.	30 mo.	16	7
1990	9 mo. 2 wk.	25 mo	25	10
1991	4 mo. 2 wk.	20 mo. 1 wk.	11	4
1992	4 mo. 1 wk.	21 mo. 3 wk.	12	5

The JO, in the report that listed these figures, stated that "An interval over seven months adversely affects the regulatory program involved, and an interval over 12 months is highly detrimental to the regulatory program. Seventeen cases were unduly delayed." Annual Report of the Judicial Officer to the Secretary, at 2. The JO explained his backlog as follows:

> The oldest case pending on appeal from an ALJ's decision has been on the Judicial Officer's desk for 8 3/4 months, compared to 16 1/2 months last year. The undue delay in some of the Judicial Officer's decisions is due to the increase in the number of complex cases being appealed to the Judicial Officer in recent years, and the need to write lengthy decisions in a number of cases explaining why the Judicial Officer disagrees with the ALJ's decision. The Judicial Officer disagreed with the ALJ's reasoning or result in 22 of the 55 cases (or 40%) in which the ALJ's decision was at issue.

Id., at 2-3.

[366] In a 1992 report, the JO summarized his activities for the years 1990-92 as follows:

	FY 90	**FY 91**	**FY 92**
Cases Pending Beginning of Year	18	13	20
Cases Received During Year	37	63	56
Cases Decided During Year	42	56	62
Cases Pending End of Year	13	20	14

[367] The WAB's current docket averages 65-80 cases per year. However, the Board is only in its second year with full-time members.

[368] At the end of fiscal year 1992, OAA had 191 cases pending. Somewhere between 1/2 and 3/4 of these cases were over six months old, and at least half were over a year old. A "lot" of cases were over two years old. OAA claims that the backlog is due, in large part, to inadequate staffing in the early years. During this period, the backlog "grew and grew." During the last two or three years, staffing levels have improved as has OAA's disposition rate.

However, the statistics reveal that OAA gained only marginally against its backlog:

Year	Pending Start of FY	Cases Received	Cases Completed	Pending End of Year
1988	209	135	123	221
1989	221	118	101	238
1990	238	116	124	230
1991	230	141	142	229
1992	229	186	197	191

[369] The BRB's Monthly Status Report for the month of August, 1993, shows that it had 4,637 cases pending (2,836 Black Lung and 1,801 Longshore cases). During the month, the BRB completed 286 cases (236 Black Lung and 50 Longshore cases). The average completion time was 23.79 months for Black Lung cases and 27.01 months for Longshore cases. These latter statistics were year-to-date statistics. For cases completed during August, the average completion time was 19.10 months for Black Lung cases and 30.12 months for Longshore cases.

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[370] The office is relatively new so it is difficult to know how many cases it will handle a year. At the time of the interview, 17 cases were pending. The office issued the following number of decisions and orders in recent years:

Year	**Decisions/Orders**
1989	8
1990	43
1991	60
1992	79

[371] At the date of the interview (March 10, 1993), the office had 11 cases that were complete and ready to be reviewed by the Administrator, three cases that were about to be dismissed, and three cases that had been briefed and were ready to be written up. The decision process was being slowed by delays in the Clinton Administration's transition process.

[372] The EAB's "backlog" is described as follows:

> For the sake of simplicity in gathering this information, I have arbitrarily defined "backlog" as any pending case, regardless of whether it is fully ripe for disposition, e.g., regardless of whether all briefs have been received, or the parties have requested the EAB to stay the appeal proceeding while the parties attempt to negotiate a settlement (a not infrequent request). (Because the term "backlog" has a bad connotation, I would prefer that some other descriptive terminology be used).

Letter from Judge Ronald L. McCallum to Author (Sept. 7, 1993).

K. Computerization

Unlike some ALJ offices, which do not tend to be heavily computerized, most appellate offices do tend to be computerized.[373] Some appellate bodies have even started computerizing their opinions. For example, the WAB has computerized all of the opinions rendered in its 30 year history, and is in the process of preparing an index.[374] Labor's OAA routinely adds newly-issued decisions to its computer library, and is in the process of adding older opinions. Labor's BRB provides computers to its staff attorneys, and it has a prime system that tracks cases.

VIII. Evaluating the Structures

As the foregoing discussion suggests, several different review models exist. Some agencies have appeal panels composed of AAJs while others have JOs, CAHOs or directors. Agencies also vary regarding the extent to which the agency head is involved in the review process. This section analyzes the strengths and weaknesses of the various review structures.

A. Preliminary Considerations

One of the paradoxes of the APA's approach to appellate review is that it conflicts with the APA's approach to the trial-level hearing process. At the trial level, agencies function in a very judicial manner. ALJs, who have protections designed to ensure their independence, preside over formal hearings. These ALJs render the initial decisions in the cases they hear,[375] and their decisions become final agency decisions absent "an appeal to, or review on motion of, the agency within time provided by rule."[376] The APA's appellate process is decidedly less judicial. Agency heads, who may have responsibility for supervising those involved in investigation and prosecution, are free to review ALJ decisions. The agency head retains "all the powers which it would have had in making the initial decision except as it may limit the issues on notice or by rule."[377] In other words, the agency is free to reverse the ALJ's decision or to substitute its own decision.[378] Moreover, while the APA implicitly allows agency heads to delegate the review task to subordinates, it does not provide those subordinates with job protections equivalent to those given to ALJs.[379]

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[373] The IBLA computerized five or six years ago, providing computers to both the AAJs and staff attorneys. At Labor, all of OAA's staff (11 staff attorneys who write opinions, two paralegals, plus clerical and technicals) have been offered computers. A few prefer to work in longhand.

[374] The WAB has a ZyIndex research software package which allows the board to search for decisions by words, and words linked to other words. The office is trying to load decisions on a hard drive system. At present, they have to transfer a decision to a floppy disk before it is placed on ZyIndex.

[375] "When the agency did not preside at the reception of the evidence, the presiding employee ... shall initially decide the case." 5 USC §557(b)(1988). However, no decision is required when "the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision." *Id.*

[376] *Id.*

When the APA was being considered, some pushed to judicialize the entire adjudicative process. There was even a proposal for a federal administrative court with both trial and appellate levels.[380] But Congress rejected the idea of a federal administrative court, and instead gave agencies discretion about how to structure their appellate processes.

In recent years, Congress has taken some steps to alter the APA model, and to vest review authority in independent adjudicators. But these changes have been limited involving only a few regulatory schemes. For example, Congress divided responsibility for the Occupational Safety and Health Act (OSHA)[381] between the Secretary of Labor and the Occupational Safety and Health Review Commission (OSHRC). Under OSHA, the Secretary was given responsibility for promulgating and enforcing regulations,[382] but deprived of all adjudicative authority.[383] OSHRC was given authority over adjudications. Under the Department of Energy Organization Act,[384] the Federal Energy Regulatory

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[377] *Id.*

[378] A recent ACUS study noted this dichotomy:

> Ambivalence towards use of ALJs is tied ironically to the attribute that many would assert is their greatest asset: strict independence from participant or agency control. This was certainly the attribute that motivated the drafters of the APA to create the formal adjudication process in 1946. But while the APA protected the ALJ from improper agency control over the decision process, it also ensured that the outcome of the decisions ALJs presided over rested formally in the agency head's hands. This compromise over the functions ALJs perform under the APA serves to confuse their role today. The ALJ is independent during the course of the decision process, but once a decision is made it is not granted the respect of automatic finality or even deference.

1992 ALJ Study, *supra* note 13, at 11. The report goes on to note that: "[t]he APA, however, was not designed to enshrine the ALJ's decision. It was designed to protect the ALJ's decision on the evidentiary facts from being skewed for policy reasons." *Id.*, at 29.

[379] 5 USC §554(d) (1992).

[380] *See* O'Reilly, *supra* note 17, at 365; *see also* Attorney General's Committee on Administrative Procedure - Majority and Minority Reports, 27 A.B.A. J. 91, 93 (1941).

[381] 29 USC §§651(b)(3), 661 (1988).

[382] The Secretary has rulemaking powers which it can exercise to set and enforce workplace health and safety standards. *See* 29 USC §§665, 658-59 & 666 (1988).

[383] 29 USC §651(b)(3)(1988). Under the Act, the Secretary may issue a citation. If an employer wishes to contest the citation, OSHRC must hold an evidentiary hearing and "thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." 29 USC §659(c)(1988).

[384] 42 USC §§7101, *et seq.* (1988).

Commission (FERC) was given the power to review Department of Energy decisions.[385]

B. Is Political Review Really Needed?

Should this trend, towards depriving agency heads of their appellate review authority and vesting that authority in independent adjudicators, be accelerated? There are definite advantages to political review, but significant disadvantages as well.

1. The Advantages of Political Review

(a) Need for Policy Control

The most important reason for allowing agency heads to retain their review authority is to permit them to control regulatory schemes under their supervision. As the Supreme Court recognized in *SEC v. Chenery Corp.*,[386] agency adjudications often involve interpretations of statutory and regulatory provisions, and these interpretations can contain policy choices that result in the creation of new policies and rules.[387] If adjudicative decisions contain policy choices, it is understandable that the agency responsible for a regulatory scheme wishes to review those choices.

But the need for political review of ALJ decisions varies from agency to agency. At a number of the agencies studied (e.g., USPS, USDA & SSA), the agency head has virtually relinquished review authority to independent subordinates. The agency head maintains ultimate control in the sense that, if the agency head dislikes the reviewer's decisions, the agency head can remove the reviewer and appoint someone else. But this power is rarely exercised. For example, USPS' and USDA's have had relatively good job security. Indeed, USDA has had only two JOs in more than 50 years. Of the agencies studied, only

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[385] 42 USC §7172 (1988).

[386] 332 U.S. 194 (1947).

[387] *See* Morgenthau, *Implied Regulatory Powers in Administrative Law*, 28 IOWA L. REV. 575, 585 (1942-43):

> What administrative agencies and courts do when they interpret a statutory provision…is, therefore not in essence, but only in the degree of discretion which the interpreting officer may exercise, different from what Congress is doing when it legislates under the Constitution, and from what the Supreme Court is doing when it interprets the Constitution. They all legislate by substituting specific, individualized rules for general and abstract rules and by thus creating rules of law which would not exist had they not been created by them; they all interpret by remaining, while legislating, within the limits of abstract, general rules of law. He who interprets of necessity legislates, and he who legislates of necessity interprets.

See also Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587, 607-10 (1984).

Labor has actually removed appellate reviewers (it having transferred both WAB and BRB members).

Even at those agencies where the agency head retains review authority, the authority is rarely exercised. Interior provides a good example. Although the Secretary of the Interior has discretionary authority to review decisions of Interior's intermediate review boards (except for IBCA decisions), the Secretary actually reviews very few cases per year. At the FCC and the NRC, agency review of adjudicatory decisions is purely discretionary and is invoked only when important policy issues are presented.[388]

When agency heads (or other high-level political appointees) actually do review adjudicative decisions, they often delegate the review responsibility to subordinates. These subordinates analyze case records and briefs, and prepare the initial drafts of decisions. The agency head will review the subordinates' work, but the scope of review varies depending on the inclinations of the reviewer. At some agencies, the review is very limited.[389] The agency head meets with subordinates for only a brief period, focusing on a few major issues, and may not read the record or any of the briefs.

These reviews do not always focus exclusively on policy issues. Labor's former Deputy Secretary (who was the reviewing official during his tenure at the agency) claims that he was forced to make very few political judgments in his review of OAA decisions.[390] In his view, most decisions were law driven and did not involve political judgments.[391] He focused mainly on making sure that OAA turned out a quality work product in a timely manner.[392]

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[388] Although some agencies have cases that involve political issues, they do not always decide those cases politically. DOT's international route certification cases often involve policy considerations. But, because such cases involve lucrative routes, the Secretary's involvement in the process has been limited.

[389] At Labor, secretarial review is handled by the Office of Appellate Adjudication which reviews the record and prepares the initial decision. That office maintains a staff of lawyers who review ALJ decisions, prepare draft decisions for the reviewing official (now the Secretary), and consult with the reviewing official regarding content. The Secretary makes the call on important policy issues, but does not generally review the record in the case. Sometimes, the Secretary talks to OAA staff attorneys about how to decide cases.

[390] OAA's Acting Director agreed with this statement.

[391] The Deputy Secretary claims that he micro-managed OAA early in his tenure actively reviewing every decision prepared by OAA. But his goal was not to control the political content of decisions, but rather to improve the quality of the work. As the quality improved, and the Deputy Secretary gained confidence in OAA's ability to write quality decisions, he began to delegate more. The Deputy Secretary then began to ask his executive assistants to review cases and discuss their conclusions with him. Occasionally, the Deputy Secretary would meet with OAA opinion writers.

OAA's Acting Director disagreed with the former Deputy Secretary's assessment. He does not recall the Deputy Secretary ever sending an opinion back for a rewrite.

[392] The Deputy Secretary claims that he was confronted by slipshod or marginal work early in his tenure. However, even then, the Deputy Secretary wasn't concerned about OAA's political positions, but rather by the quality of the work. He claims that, over time, as the quality began to improve, OAA's work flowed through the system with few changes.

Nevertheless, political review can perform an important function. Labor's former Deputy Secretary stated that, although most of his cases did not require political judgments, some of them did have political overtones.[393] He felt that the "political structure needs to bite on the significance of these cases." The same thing is true at Interior. As one review board member stated, the former Secretary rarely involved himself in the adjudicative process except when the result below gives the Secretary "heartburn."

(b) Greater Understanding

An additional advantage of political review is that it helps the agency head gain greater awareness of how a regulatory system is functioning. Those who decide cases arising from a regulatory program have a unique perspective on the functioning of that program. A decision writer in one agency stated that during meetings regarding the content of an adjudicative opinion, she has seen the agency head tell subordinates to take action to bring about changes in a regulatory scheme.

(c) Ability to Make Tough Decisions

Some argue that only political appointees can adequately deal with some types of cases. The former Deputy Secretary of Labor suggested that some OAA cases involve allegations against other political appointees, and wondered whether someone other than a political appointee would have the temerity to act against another political appointee.[394] The political appointee has more clout in the regulatory structure, which makes it easier for him to take difficult positions. Of course, if an agency has an independent review board, with job protections like those accorded to ALJs, that board might be better able to make tough decisions than either a Deputy Secretary or a review board, both of which lack job protections.[395]

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[393] He offered the example of whistleblower cases which he described as significant and sensitive, and which almost always have a political gloss. OAA's Acting Director disagreed. He felt that most Whistleblower cases involve private employers and lack political overtones. He felt that CETA cases do have political overtones.

[394] OAA's Director cited worker training statutes (CETA and JTPA) as cases that might involve allegations against political officials.

[395] Labor's Deputy Secretary felt that there were other cases which a political appointee was in the best position to resolve. He offered the example of cases in which state or local governments had been saddled with audit exceptions that were some 10 or 12 years old. The Deputy Secretary felt, at one point, that some of these cases warranted special relief, especially those involving small cities that were saddled with large obligations ($250,000.). The Deputy Secretary was discouraged from giving this relief by Labor's Inspector General. The IG felt that it would be inequitable to grant such relief. The only cases that came to the Deputy Secretary's attention were those in which the parties had "played hardball." Those who did not play "hardball" either paid their bill or settled. As a result, the IG felt that those who came to the Deputy Secretary's attention were the least deserving of relief. But, had the Deputy Secretary felt that

(d) Consistency of Decisionmaking

A second reason why agency heads like to review adjudicative decisions is to ensure consistency of result. Some agencies have a large number of ALJs issuing decisions. With so many ALJs, there is a significant risk of inconsistency. Even when an agency has fewer ALJs, inconsistent decisions are a reality of the adjudicative process. Agency review of ALJ decisions allows the agency to make sure that its adjudicative decisions consistently apply agency policy.

But the objective of consistency does not necessitate participation by the agency head or other high-level political appointee. Independent appellate reviewers, even ones with protections equivalent to ALJs, can readily perform this function. At a number of agencies (e.g., USPS, USDA and EPA) subordinates review decisions for consistency (and, in some cases, they conduct policy review as well). At SSA, the AC is supposed to ensure consistency of decision as well but ALJs question whether the AC performs this function well. To the extent that the AC fails, the failure is probably attributable to the AC's massive caseload, which involves large numbers of reviewers.

2. The Arguments Against Political Review

Even though there are significant reasons for allowing agency heads (and other high-level political appointees) to review adjudicative decisions, there are significant disadvantages to such review as well.

(a) Meaningful Participation

The major problem with agency review is that the agency head's review is often the most meaningful part of the adjudicative process, but litigants often have little opportunity to participate before the agency head. The agency head's review is the most meaningful because the agency head is not bound by the ALJ's legal or factual conclusions, and is free to overturn the ALJ's decision, and to substitute a different decision.[396] It is also more meaningful because the agency head has greater freedom to make or change agency policy. ALJs, like lower court judges, may feel bound by prior agency decisions even when they dislike those decisions. The agency head, on the other hand, is the agency's court of last resort and can overturn the agency's prior decisions.

But, when the agency head reviews a case, the parties have only a limited chance for input. In the vast majority of cases, an ALJ presides over the initial

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relief was appropriate, he was in position to give it. The Deputy Secretary doubted that a review board would have been willing to give such relief. Thus, the Deputy Secretary felt that he could have exercised pure political judgment in a way that would have given the agency a necessary degree of regulatory flexibility.

[396] 5 USC §557(b) (1992).

hearing, compiles a record, and issues a preliminary decision. The agency head's review is conducted on the record. The parties might be given the chance to file briefs, objecting to the ALJ's decision, but will rarely be given the chance for oral argument. In other words, the case is reviewed based on the record and the briefs.

At most agencies, the agency head takes little part in the review process. The agency head may have ultimate responsibility for the agency's decision, but the agency head will delegate the review task to subordinates. Such delegation may be necessary and inevitable. Many agency heads are burdened with other responsibilities besides adjudication. Moreover, at most agencies, there are far too many cases for the agency head to carefully review all of them. As one congressmen noted in the debate over the Schwellenbach Act:[397] "The fact is that if the Secretary of Agriculture himself personally should read the record, and personally review the findings in each case, it would take all his time; there would be no other work done by him except that one task."[398]

These circumstances force agency heads to engage in a very limited review process. They ask subordinates to review the records and briefs, and have them prepare proposed decisions. The agency head will usually meet with the subordinates to discuss the case, but the meeting may be brief depending on the interests and obligations of the agency head. As a result, even though the agency head's review of a case may be the most meaningful, it may also be the most limited. Litigants are given only an indirect opportunity to persuade the agency head.

Such limited review is permissible given the Supreme Court's holding in *Morgan v. United States* (*Morgan I*).[399] In that case, appellants alleged that "the Secretary made the rate order without having heard the oral arguments or having read or considered the briefs which the plaintiff submitted,"[400] and claimed that this process deprived them of their right to a hearing.[401] The Court agreed stating that "[t]he one who decides must hear."[402] But the Court dramatically limited the scope of its holding by specifically stating that agency heads could have subordinates assist them in the review process.[403] These subordinates could perform many functions:

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[397] 7 USC §§450c-450g (1988).

[398] 84 Cong. Rec. 7092 (1939). Senator Jacob Javits stated similar views in hearings on the Occupational Safety and Health Act:

> [B]ecause of the awkwardness of this procedure and the heavy burden of personally reviewing hundreds of enforcement cases, it is highly likely that the Secretary of Labor will not even exercise his power under the Committee bill personally, but will delegate it to a panel of officials within the Department. That is precisely what the Secretary of Interior has done under the Coal Mine Health and Safety Act of 1969. The net result will be enforcement by a panel anyway, but not one which is independent, and without the benefit of the shortened procedures which my amendment would provide.

Statement of Senator Jacob Javits, S. Rep. No. 1282, 91st Cong., 2nd Sess. 1, 57 (1970), *reprinted in* 1970 USCC.A.N. 5177, 5221 (hereafter *Javits Statement*).

[399] 298 U.S. 468 (1936).

[400] *Id.*, at 478.

[401] *Id.*, at 474.

> This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense.[404]

Moreover, in *United States v. Morgan* (*Morgan IV*)[405] the Court made it difficult for litigants to ascertain whether agency heads had performed their review functions. In that case, the district court held that the parties could depose the Secretary of Agriculture regarding his decisionmaking process.[406] The Supreme Court overruled holding that "the Secretary should never have been subjected to this examination."[407] The Secretary's mental processes could not be probed.[408]

From the litigant's perspective, this review process may smack of unfairness. The person who actually decides may be relatively unfamiliar with the record and the arguments made in the case. Subordinates sift and analyze evidence and make recommendations to the decisionmaker in the form of proposed decisions and orders.

(b) Smooth Transitions

Review by the agency head can also create other problems. If political review is a required part of the adjudicative process, then the entire process can be slowed or delayed by a change in presidential administrations. When the Clinton Administration came to power, it was slow about naming political appointees to various departments. At some agencies, where political review was a necessary part of the adjudicative process, the process ground to a virtual halt. The Labor Department's situation provides a good example. At the date of the interview, March 4, 1993, Labor's Deputy Secretary had been named but not confirmed. Absent the Deputy Secretary, Labor's Office of Administrative Appeals (OAA) was unable to issue decisions except by the signature of the Secretary himself (who was bogged down in other matters). In the period between Inauguration Day (January 20) and March 4, only two decisions were rendered. Both of those decisions had statutorily imposed deadlines, and neither was issued until the deadline date. As of March 4, OAA did not know when the new appointees would be on board, and when it would be able to begin issuing decisions again.[409]

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[402] The Court stated in full that:

> For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who made the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

Id., at 481.

[403] *Id.*, at 481.

[404] *Id.*

[405] 313 U.S. 409 (1941).

[406] *Id.*, at 422.

[407] *Id.*

[408] *Id.*

Such problems can be minimized if the power to issue opinions has been delegated to someone other than a political appointee. If that person (or board) remains during the transition, decisions can be issued as usual. Of course, delegation to a non-appointee is not a complete solution. As OAA's Director suggested, transition problems can occur even when there is no change of President (i.e., when a high-level political appointee resigns). While the agency searches for a replacement, the adjudicative process can come to a standstill.

(c) Perception Problems

Another disadvantage of political review is that it undermines the adjudicative process. As previously noted, the APA requires agencies to ensure the independence of their ALJs. But, once an ALJ's decision is rendered, the case can be appealed to individuals who have no comparable protections. In some agencies, the agency head delegates the review process to the agency's Office of General Counsel—the same office that is litigating the case. The agency's regulations may provide for a wall of separation between those who litigate and those who adjudicate, but it is difficult for those outside the agency to know whether this separation is actually observed.[410] Litigants know that their case has been appealed, and they may have the chance to file briefs. But the parties may hear little or nothing for many months while the agency head considers the case. During this time, the agency head may consult with many different people within the agency. Those outside the agency will generally know little about who discussed what with whom, and may wonder about the fairness of the process.[411] They may also wonder about whether their case was decided on political rather than legal grounds.[412]

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[409] According to OAA's Acting Director, OAA was able to start issuing decisions again in late May, 1993.

[410] As two senators stated in hearings on the Occupational Safety and Health Act. "A separate Board whose members are professional experts will achieve a far greater degree of public confidence than a Secretary of Labor who combines the roles of rule-maker, inspector, prosecutor, and adjudicator of violations." Joint Statement of Senators Peter H. Dominick and Ralph Tyler Smith, S. Rep. No. 1282, 91st Cong., 2nd Sess. 1, 57 (1970) *reprinted in* 1970 USCC.A.N. 5177, 5221.

(d) Political Manipulation of the Review Process

It is also possible that when political appointees are involved in the review process inappropriate political considerations may slow or affect the review process. In a recent report, Labor's IG suggested that OAA may have delayed consideration of some cases for political reasons:

> We interviewed OAA personnel and were told that OFCCP "pattern practice" discrimination cases involving numerous employees were not processed at the direction of OAA's Executive Director who said this was because there was no interest in the Office of the Secretary to process "pattern practice" discrimination cases.[413]

The IG was unable to confirm whether such allegations were true.[414] The Executive Director, who made the statement, was no longer with the agency.

(e) Incentive to Create Adjudicative Rules

A further problem with permitting agency heads to review adjudicative decisions is that such decisions can contain declarations of policy. Since agency heads are free to declare policy adjudicatively, they have less incentive to articulate policy legislatively.

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[411] Senator Javits made this point in a Senate report on the Occupational Safety and Health Act:

> [H]earing and determination of enforcement cases by an independent panel more closely accords with traditional notions of due process than would hearing and determination by the Secretary. In the latter case the Secretary is essentially acting as prosecutor and judge. Any finding by the Secretary in favor of a respondent would be essentially a repudiation by the Secretary of his own Department's employees. While this type of enforcement has been used in conjunction with other statutes, is contemplated by the Administrative Procedure Act, and is not jurisdictionally defective on due process grounds, the awkward mechanics it imposes upon heads of Departments who wish to exercise their adjudicatory power personally in order to preserve due process has not generally been appreciated. What happens is that one official of the Department (e.g., the Deputy Solicitor) will take the position of prosecutor and another official (e.g., the Solicitor) will take the position of a neutral in order to advise the Secretary.

Javits Statement, *supra* note 398, at 5220.

[412] When an agency has the power to award lucrative benefits (*e.g.*, international airline routes), there is a chance that a political appointee will reward contributors by granting them the route. Of course, if this happens, the appointee may pay a political cost.

[413] *Second IG's Report*, *supra* note 358, at 7.

[414] *Id.*

The preferability of legislative rulemaking is unquestioned. For decades, commentators have complained about the tendency of some agencies to create new rules adjudicatively rather than legislatively.[415] These commentators argue that Congress established informal procedures to ensure that those affected by proposed rules are given a voice in the legislative process.[416] They also argue that legislative procedures are preferable to adjudicative procedures, and that agencies should generally be forced to use those procedures.[417]

There are many reasons why legislative rules are preferable. Legislative procedures involve a more open and inclusive process. In addition, legislative rules are usually applied prospectively. When agencies create adjudicative rules, they announce policies in pending cases and simultaneously apply the policies to those cases. When this happens, there is a significant risk of unfairness. At the same time that regulated entities learn about a standard, they may find that they failed to comply with that standard and are being penalized.[418] Thus, regulated entities may be subjected to policies without first being given notice and an opportunity to comply with those policies.[419] Legislative rules solve this problem because they are almost always applied prospectively.

Political review of ALJ decisions exacerbates these problems. To the extent that political appointees are involved in the review process, they have little incentive to create rules legislatively. They can simply declare new policies in pending cases. In addition, retroactivity problems are enhanced. An agency's position on issues can change from one administration to the next as each new administration brings with it new personalities and different concepts of policy.[420] If a later administration's attitude towards a regulatory scheme differs from that of a prior administration, the agency's interpretation of that scheme can be altered. These changes can present problems for regulated entities who may have relied on the prior interpretation, especially when the agency articulates its positions in adjudicative decisions without giving prior notice.[421]

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[415] *See* Cornelius J. Peck, *The Atrophied Rule-making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1233 (1974).

[416] Informal procedures accomplish that objective by requiring agencies to publish a notice of proposed rulemaking in the Federal Register, 5 USC §553(b) (1988), by giving interested parties the opportunity to comment on the notice, 5 USC §553(c) (1988), and by requiring the agency to consider those comments. *Id.*

[417] *See* 2 K. C. Davis, *supra* note 1, at §7.26 ("The near universal judicial and scholarly criticism of agency use of adjudication as a vehicle for formulating general rules is based on considerations that can be placed in three general categories: quality, efficiency and fairness.").

[418] To the extent that agencies can be encouraged to announce more rules legislatively they may discourage some regulatory litigation. When agencies create rules adjudicatively, there is a risk that, when regulated entities learn about the existence of regulatory requirements, they are already in violation thereof. In many instances, regulated entities have little choice but to engage in costly and protracted litigation to challenge the adjudicative rule. *See* Russell L. Weaver, *Contemporaneous Construction Discovery: Its Use and Abuse*, 20 WAKE FOREST L. REV. 367 (1984).

[419] *See* Russell L. Weaver, *Retroactive Regulatory Interpretations: An Analysis of Judicial Responses*, 61 NOTRE DAME L. REV. 167 (1986).

Of course, the mere fact that political review is abolished will not eliminate adjudicative rulemaking. A certain amount of adjudicative rulemaking is inevitable—as the Supreme Court recognized in *Chenery II*.[422] But, if agency heads are unable to review the policy choices made in adjudications, they might be encouraged to create more rules legislatively as a way of limiting and controlling adjudicative discretion.

Of course, there is no assurance that agency heads will respond to a loss of adjudicative control by creating new adjudicative rules. The United States Supreme Court's recent decision in *Martin v. Occupational Safety and Health Review Commission*,[423] gives agencies other ways to control the adjudicative process. In that case, the Court was confronted by a dispute between the Secretary of Labor ("Secretary") and the Occupational Safety and Health Review Commission ("OSHRC"). Both had interpreted the Secretary's regulations, and each claimed that its interpretation was entitled to deference. The Supreme Court ultimately resolved this issue in favor of the Secretary. It held that, when OSHRC disagrees with the Secretary, OSHRC is required to defer to the Secretary's interpretation provided that the interpretation is reasonable. The interesting thing about *Martin* was that the Secretary's interpretation was stated in a citation.[424] Respondent argued that an interpretation stated in that form was not deserving of deference. The Court disagreed. In its view, the critical question was whether the agency had exercised "delegated lawmaking authority." If so, deference was due. The Court found that the agency had exercised such authority: "when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress."[425] Thus, it is "as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard."[426] As a result, an agency might be free to continue to state its interpretations in citations or other litigation documents and in that way control the policy choices made in litigation.[427]

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[420] One official, who has been through several administrations, stated that it is difficult to know what will peak a political appointee's interest. At DOL's OAA, different Deputy Secretaries have had different levels of involvement in the office's functioning. Some have been very actively involved, reading and signing off on all opinions. Others have been less involved.

[421] *See* Weaver, *supra* note 419.

[422] 332 U.S., at 202-03:

> [P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.

See also Report of the U.S. Attorney General's Comm'n on Admin. Procedure in Gov't Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 29 (1941); Russell L. Weaver, *Chenery II: A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161 (1988).

[423] 499 U.S. 144 (1991).

In any event, it might not be desirable to strip agency heads of their power to create adjudicative rules. If review authority is vested in independent subordinates, then they will be the ones making adjudicative rules. These reviewers are not elected, and are less likely to be politically responsive. If the reviewers are given job protections equivalent to the protections provided to ALJs, they become essentially an independent and uncontrolled branch of government. It might be better to retain adjudicative control in a politically responsive official. Otherwise, although they can alter regulatory policy legislatively, they cannot do so as quickly as when they can do so adjudicatively.

C. The Advantages of Intermediate Review Boards

If an agency head is going to retain review authority, is it generally desirable for the agency to have an intermediate review board? Agency heads like these intermediate boards for several reasons. The review board relieves the head of the day-to-day review burden which can be burdensome and time consuming. When agencies have review boards, the agency head can focus on important policy issues.[428]

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[424] *Id.* at 148.

[425] *Id.* at 157.

[426] *Id.*

[427] In *Martin*, the Court rejected claims that a citation represents nothing more than the agency's "litigating position," and therefore is "undeserving of judicial deference." *Id.* at 155. It began by reaffirming the general rule that "agency 'litigating positions' are not entitled to deference. *Id.* But the Court emphasized that this rule applies only to litigating positions that are "'*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court," and "*after* agency proceedings have terminated." *Id.* The Court concluded that deference is required when a litigating position involves an "exercise of the Secretary's delegated lawmaking powers." *Id.* It deferred to the Secretary's citation on the basis that it "*is* agency action, not a *post hoc* rationalization of it." *Id.*

[428] Of course, even when an agency does not have an intermediate review board, it will usually have assistants that undertake the initial review of cases. These assistants allow the agency head to focus more attention on policy issues and less on detail. At most agencies that have review boards, agency heads review cases on a purely discretionary basis.

Even when the agency head feels compelled to review a case, the review board's decision can limit the review burden. Before the agency head must decide whether to intervene, a case must be tried before an ALJ and reviewed by the agency's intermediate review board. When the case gets to the agency head, a record exists and the case has been summarized and analyzed at two levels. The agency head is then free to focus on policy issues. The FCC's Review board was established to perform this screening function.[429] The FCC is generally content to allow its Review Board to handle the review. But the FCC requires its Review Board to certify policy questions to the entire Commission. In addition, the FCC reserves discretionary authority to evaluate Review Board decisions.[430]

Agency heads may also like review boards because the boards deal first with difficult and controversial issues allowing the agency head to reserve judgment until later. If the review board renders an unpalatable decision, the agency head can always reverse it. On the other hand, if the board renders a tough decision that the agency head believes is necessary, the agency head can let the decision stand. In that way, the agency head can deflect some of the criticism and controversy to the board.

But intermediate review boards are far from essential. Intermediate review can be conducted by staff in the agency head's office. For example, DOL has two review boards (WAB and BRB), but some of its cases are routed through OAA for ultimate decision by the Deputy Secretary. Cases sent to OAA are initially reviewed by OAA staff, and a draft opinion is sent to the Secretary for his signature. Some Secretaries do not actively review OAA's actions thereby allowing that office to function in a relatively autonomous fashion. Nevertheless, the Secretary bears ultimate responsibility and control.

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[429] The Review Board relieved the Commission of the nitty-gritty details of adjudication, and allowed the Commission to focus its attention on policy issues. Some have argued, as recently as 1990, for abolition of the Board. They would like to have the Board's functions merged into the Office of General Counsel.

[430] 41 Fed. Reg. 14866 (1976):

> A **certiorari** procedure will apply when Commission review of final Review Board decisions is sought. This will permit the Commission to deny promptly an application for review where no issues warranting Commission attention are present in the case, but afford full review where the Board's decision is determined to raise concerns warranting detailed Commission consideration.
>
> Review is only granted in situations when
>
> (1) the Board's findings are not supported by substantial evidence in the record as a whole; (2) the Board's decision involves prejudicial errors of substantive or procedural law; or (3) the Board's decision is arbitrary or capricious; (4) the Board's decision conflicts with Commission policy; or (5) the Board's decision raises a novel or important issue of law or policy which warrants Commission review. The application for review and oppositions would be limited to ten pages. Replies would be allowed only if requested by the Commission, and if requested, would be limited to five pages. If the application for review were granted, parties would be afforded an opportunity to file briefs and reply briefs, which would be limited to 25 pages.

41 Fed. Reg. 14869 (1976).

Intermediate review boards do have disadvantages. One disadvantage is cost. Most review board members are well paid. They are paid far more than support staff who assist the agency head in the review process. In addition, they require substantial logistical support. In a time of huge federal budget deficits, it may be difficult to justify this additional cost merely to allow a political appointee to deflect political heat. Moreover, as a matter of responsibility, it might be preferable to force political appointees to make the tough decisions.

A second disadvantage is that review boards can lengthen the review process. Instead of having to pass through two stages (the ALJ stage and the agency head review phase), the case must go through three. At some agencies, review boards can take a year or more to review a case. If the case is then reviewed by the agency head, the case may remain before the agency for another year or so. Of course, review boards do no always lengthen the review process. If the agency head routinely defers to the board's decision, and does not review them, review boards can actually shorten the review process. During the first 20 months of its existence, the FCC's Review Board was able to dispose of cases in 172 days on average. When the Commission conducted its own review, it took an average of 262 days to dispose of a case. Since the Commission rarely reviews Review Board decisions, the Review Board was generally able to complete its review more quickly than the Commission.

Even if intermediate review boards lengthen the review process, this lengthening may be justified by circumstances. Usually, prompt resolution of a pending matter is desirable. But, delays may be justified in light of the benefit that results to the agency head from the use of an intermediate review board (e.g., lighter load, ability to focus on policy issues, etc.).

The final disadvantage of intermediate review boards is that the agency head is less involved in the review process. In 1991, the NRC abolished its Atomic Safety and Licensing Appeal Panel (ASLAP). In taking this step, the Commission stated that it wanted to be more involved in making decisions that have public health and safety implications. Cynical observers claimed that the NRC abolished ASLAP because it had gotten too independent.

D. Independent Review Systems: Is The Judicial Officer Model Preferable to the Review Board Model?

If agencies decide to establish independent review systems, there are two widely used models available to them: the review board model and the JO model. Of the agencies studied, a number of agencies use the JO model (e.g., USPS and

USDA) or used that model (e.g., EPA), and a number of agencies have review boards (e.g., DOI, FCC, and DOL). Each system has strengths and weaknesses.

The two systems are not technically comparable. Most agencies that have JOs (defined broadly to include other appellate reviewers who function alone like EOIR's CAHO) allow the JO to render final decisions. Thus, the JO does not function as an "intermediate" appellate reviewer. Agencies that have review boards generally subject the decisions of those boards to further review. Thus, one difference between the two systems is control. Under the JO system, the agency relinquishes policy control whereas under most review board systems it does not. But this comparison is not entirely accurate since the decisions of some review boards are final (e.g., WAB, BRB and AC decisions), and agencies could retain discretionary authority even under the JO system.

The principal advantage of the JO system is cost. The JO often functions alone or with a small support staff. At the USDA, for example, the JO's office contains only the JO, a staff attorney and a legal technician. At USPS, the JO has somewhat broader functions because he administers the ALJ office and he serves as Chairman of the BCA. Nevertheless, his legal staff includes only himself and an opinion writer. When the EPA used the JO system, there were two JOs.

Agencies that have collegial bodies often have far larger staffs. Instead of a JO, they have three to five AAJs, all of whom are relatively well-paid. For example, EPA's AAJs are all SES V. Because collegial bodies involve more deciding officials, they also have larger support staffs. Many review boards provide a secretary and a staff attorney to each review board member. Thus, a review board system can involve as much as three times as much cost as a JO system. The JO system is also, in some respects, more efficient. A JO functions alone and can decide cases relatively quickly. A collegial body must deliberate. Depending on the size of the body, this deliberation can involve two or more people thereby increasing the costs involved in reaching a decision.

But issues of cost and efficiency can be viewed from more than one perspective. An EAB AAJ, who formerly served as his agency's CJO, stated that JO systems are generally cheaper "if costs are narrowly defined as the Agency's own out-of-pocket costs. However, when other costs associated with the decisionmaking process at EPA are properly taken into account,...the increased ability of the Board to simultaneously deal with multiple complex cases can result in significant societal cost savings."[431] He went on to note that:

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[431] Letter from Ronald L. McCallum, Environmental Appeals Judge, to Author, at 1 (Sept. 7, 1993). The letter goes on to state that:

> [O]ne of the chief advantages of the EAB over the JO system at EPA has been the Board's ability to focus simultaneously on multiple complex cases. The three member Board can divide such cases among themselves for purposes of preparing draft opinions, sifting through the record, etc., whereas JOs must proceed with each case sequentially

> A multimillion dollar project, such as a new power plant, municipal waste incinerator, or automobile assembly facility, cannot go forward until the Board has reviewed challenges to the permit to ensure that it contains all required environmentally beneficial limitations and restrictions. These facilities mean jobs for those who construct and operate them, and are a source of tax revenue for government at all levels. Therefore, if you accept the notion that the purpose of government is to serve the people, these cost considerations—and the savings that result from making a final permit decision sooner than later—should also be taken into account. The result, I suspect, makes the additional out-of-pocket costs associated with a Board system, versus a JO system, relatively insignificant.[432]

An additional advantage of the JO system may be consistency. Those agencies that use the JO system have a single appellate reviewer. In some instances, this reviewer has been with the agency for a considerable period of time (e.g., USDA's JO who has been the JO since 1971, and USPS' JO has served since 1978). A single person working alone should have a good understanding of prior precedent since it is his own. Review boards, on the other hand, may have a somewhat greater tendency for inconsistency. SSA's AC is frequently accused of inconsistency. But it has 17 judges actively deciding cases, and they render more than 60,000 decisions per year. Under these circumstances, inconsistency is perhaps inevitable. Review boards may also suffer from inconsistency when not all board members review all cases that come before the boards.

There are two major disadvantages to the JO system. The first disadvantage is that, depending on the agency, the workload may be too great for one person. USDA's JO complains that his workload is quite heavy and that it is difficult for him to keep up. He receives about 50 cases per year, and actually decides more cases than that due to a pending backlog.[433] A single case may involve a record four or five feet high with multiple issues any one of which could constitute a case

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(or jump around from one case to another). As a result, the Board is better able to complete all cases expeditiously than is possible under the JO system.

Id., at 2.

[432] *Id.* at 2.

[433] The JO's disposition rate is as follows:

Year	Number of Dispositions
1992	62
1991	56
1990	42
1989	43
1978	25

on its own. USDA's JO believes that it would be preferable for his agency to have a collegial board rather than a JO.[434] EPA's former JO, who is now a member of EPA's Environmental Appeals Board, stated that his JO workload was quite heavy and that he had difficulty keeping up. USPS' JO states that his workload is very large, and is perhaps too large for a single person. Obviously, it would be impossible for a single JO to deal with SSA's 60,000 plus appeals.

Of course, a collegial system is only a partial remedy for the workload problem. The collegial system provides the JO with some help by placing additional judges in the office. But, at the same time, the collegial process increases the total work load by necessitating discussion and debate between the AAJs. However, individual board members can assume responsibility for preparing drafts of decisions thereby freeing other board members to write other opinions.

USDA's JO argues that a review board would be preferable to the JO system because of the great importance of the cases he decides. Of course, the collegial process may produce a better final result. When an agency has a single JO, and that officer functions independently, an agency's appellate decisions depend entirely on the perceptions and beliefs of that individual. At one agency, ALJs complain that their JO is somewhat idiosyncratic. When a collegial body is involved, several individuals examine a problem thereby illuminating and sharpening the issues. This process hopefully leads to a better final result. At USDA, many cases involve significant financial interests. The JO has life and death control over businesses by virtue of the fact that he can revoke[435] or suspend their licenses.[436] Given the nature of these interests, USDA's JO believes that his cases should be subject to collegial review and debate.

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[434] The EPA, which used to have the JO system, adopted the review board system when it created the EAB. EPA's former JO believes that the change to a review board was desirable and necessary.

Whether agencies can adopt a review board system on their own, or whether they must have congressional authorization, probably depends on the agency. The USDA's governing statute at one time limited it to two JOs, and thereby seemed to preclude adoption of a review board system (at least to the extent that the Secretary wishes to have more than two review board members). 7 USC §450d (1988).

[435] Under the Perishable Agricultural Commodities Act, 7 USC §§499h(a) (1991), the USDA has the power to revoke the license of a commission merchant, dealer, or broker. When a revocation occurs, anyone "responsibly connected" with the revoked license cannot be employed by any other licensee for one year. 7 USC §§499a(9), 499h(b) (1988). Thereafter, such person can only be employed by another licensee if a bond is posted. *Id.*

[436] For example, under the Packers and Stockyard Act, 7 USC §204 (1988), the JO has the right to suspend a license. In one instance, the 9th Circuit upheld a ten-year suspension. *Spencer Livestock Comm'n Co. v. USDA*, 841 F.2d 1451 (9th Cir. 1988). Under the meat inspection laws, the JO can withdraw meat inspection when someone has been convicted of a felony or two misdemeanors relating to meat. 21 USC §671 (1988). When meat inspection is withdrawn, the business is precluded from selling meat in interstate commerce and is almost always forced to shut down. Sometimes, the JO will give the owner 90 days to get out of the business, and one year to sell all stock. *See In Re Great American Veal Co.*, 54 Agric. Dec. 1770 (1986), *aff'd.*, No. 86-3998 (D. N.J. 1987). Under the brucellosis eradication

There appears to be little difference between the JO system and the review board system with respect to the independence of appellate adjudicators. Most JOs have little or no job security. As USPS' JO indicated, if the Postmaster does not like the JO's decisions, the Postmaster can remove him as JO although he would continue to serve as Chairman of USPS' BCA. USDA's JO has few protections as well. He cannot be fired without cause, but he has no tenure in the JO position, and can be moved to another position with equal pay and status. Even though both JOs stated that they function independently, the fact that both are subordinate agency employees can create perception problems. Litigants may wonder whether the system is really fair and impartial, or whether JOs are subject to undue agency influence. Indeed, many ALJs expressed skepticism about whether individuals like JOs really do function independently.

But the review board system does not necessarily solve these problems. Many review board members have no greater protections than are provided to JOs. So, unless Congress chooses to give appellate reviewers tenure protections, JOs and review boards are equal in this respect. Because its AAJs lack protections, SSA's AC suffers from doubts about its independence. Some SSA ALJs, claimants and claimants' attorneys question its independence. But doubts about the AC's independence may be due to the fact that the AC does not hold hearings. A case is submitted to the AC and ultimately decided without any opportunity for an appearance. As a result, few understand much about how the AC works. This lack of knowledge leads to suspicion about the processes. One ALJ stated that the AC can always produce the result it desires merely by virtue of who it assigns to review cases.

E. EPA's Adoption of the Review Board Model

When EPA changed from a JO system to a review board system, it justified the change on several grounds. EPA expressed concern about the accelerating pace of administrative litigation,[437] and about the need to relieve the Administrator of the burden of reviewing and deciding so many decisions:

The Environmental Appeals Board is being established to adapt the Agency's administrative appeals process to new realities facing the Agency. In recent years, the Agency has stepped up enforcement of the environmental statutes it is charged with administering. In addition, statutory amendments (most recently the Clean Air Act Amendments of 1990) have greatly increased

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program, veterinarians can have their accreditation suspended. 9 CFR §1614 (1992). When this happens, the veterinarian is effectively out of business insofar as the veterinarian was treating large animals. The veterinarian can continue to treat cats and dogs, but not large animals which is frequently their whole business. The JO can also impose fines. For example, one business was fined $225,500 under the Agricultural Marketing Agreement Act of 1937. 7 USC §608c(14)(b) (1992).

[437] 57 Fed. Reg. 5320 (1992).

the Agency's administrative penalty authority. This increase in enforcement activity will continue to generate an increasing number of appeals to the Administrator. The Agency has also received a greater number of permit applications, resulting in more appeals from the permit decisions of Regional Administrators. As a result, the Agency needs to direct more resources to its administrative appeals process, so that it may keep pace with the growing case docket. The establishment of the Environmental Appeals Board will allow the agency to do this.[438]

As noted, the former CJO acknowledged that keeping up with the appellate caseload was difficult under the old system. There were, quite simply, too many cases and too few resources.

But EPA also expressed a desire for the advantages of collegial decisionmaking:

> Another advantage of the Board is that it will allow for a broader range of input and perspective in administrative decisionmaking. It will do this in two ways. First, three individuals, rather than just one, will review each case, lending greater authority to the Agency's decisions.[439]

The former CJO, who is now a member of the EAB, believes that the present process results in better decisions. He notes that because his fellow EAJs are far more seasoned, the collegial process allows them to collectively produce much more finely crafted opinions than when he worked alone. But he recognizes that the process consumes more time and requires greater dialogue, especially given that each EAJ has the power to dissent or to write a concurring opinion.

Finally, the EPA created the Board to alleviate perception problems by making it clear that the agency's enforcement and adjudicative functions are formally separated from each other:

> Another virtue of the Board is that it will make clear that the Administrator's enforcement authority (delegated to various Regional and Headquarters enforcement officers) and the Administrator's adjudicative authority are delegated to and exercised by, separate and distinct components of the agency, thus inspiring confidence in the fairness of agency adjudications.[440]

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[438] 57 Fed. Reg. 5321 (1992).

[439] *Id.*

[440] 57 Fed. Reg. 5322 (1992).

EPA also felt that decisions rendered by the EAB would carry more "stature and dignity" than decisions rendered by a JO.[441]

The former CJO offered an additional perspective on the change to a collegial system. He suggests that it is much easier for the Board to obtain resources than it was for him to get those resources acting alone. He believes that the Board has much greater stature so that the agency is more responsive.

F. Should Agencies With Multiple Review Boards Combine Those Boards?

Should agencies that have multiple review boards combine those boards into a single review board? Labor provides an example of where consolidation might be possible (although statutory authorization may be, and probably is, required). If a new board were created (perhaps named the Labor Review Board), it could be given jurisdiction over cases currently within the authority of the BRB and the WAB as well as cases currently assigned to OAA.[442] Alternatively, Labor might maintain the BRB but assign OAA's review functions to the WAB.

Agencies might achieve significant savings by consolidating their appellate functions in a single board. Instead of three different offices, each of which has to maintain its own administrative staff, the agency need maintain only one staff. Moreover, consolidated boards can more readily respond to caseload demands. For example, the WAB appears to be relatively current with its docket, and might be able to help the BRB become more current with its docket.

At Labor, some consolidation might be particularly appropriate. Two of Labor's three appellate bodies (BRB and OAA) have been unable to keep up with their caseloads. In some cases, this inability is due to inefficiencies within the units. In other instances, it is due to political considerations. As noted, there are allegations that OAA was told not to process certain cases. Regardless, some change in Labor's situation might be both necessary and desirable.

But whether agencies will actually benefit from board consolidation will depend on circumstances. In 1990, DOI decided not to consolidate the IBIA and IBLA.[443] A Blue Ribbon panel, appointed to study the issue, concluded that "Consolidating boards has been tried before, with less than satisfactory results."[444] The Panel justified its decision on the following grounds:

> Expecting judges to absorb additional subject matter when they are already stretched to capacity will result in even further

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[441] *Id.*

[442] Consolidation might require congressional action.

[443] *DOI Blue Ribbon Committee*, *supra* note 79, at 13.

[444] *Id.*, at 13.

> delays in deciding IBLA cases and will cause delays in deciding Indian appeal cases, as well. IBIA's workload is increasing and has been used to justify the discontinuance of IBIA judges as alternate IBLA members. Equally important is how such a consolidation might be viewed in Indian Country, which is quick to perceive that the Secretary may be subordinating or neglecting the Government's trust responsibility. This perception may have some legal basis: in 1972, one court stated that prompt issuance of decisions in Indian cases is an aspect of trust responsibility.[445]

At the time, DOI already had the ability to "cross-utilize" judges based on workload.[446]

Whether it is politically possible to combine the various boards within a single agency is more problematic. Labor may not be able to consolidate its boards without statutory authorization, and Labor's former Deputy Secretary believes that it would be politically possible to get authorization to combine the BRB and WAB (although he believes that he had the authority to combine OAA and the WAB, and he would have done so had he remained longer at Labor). In his view, the BRB has too large a constituency on Capitol Hill. Moreover, he was uncertain whether it would be desirable to combine all three boards. He felt that these boards handle very different, very specialized matters. In addition, he feared that BRB cases would dominate the workload and that other cases might get lost in the shuffle.

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[445] *Id.*, at 14.

[446] The report concluded as follows:

> No apparent benefit accrues from establishing an Appellate Division with subordinate boards, which was proposed as a way to more easily cross-utilize judges based on workload. OHA already has that flexibility; the use of alternate board judges is an on-going Office practice. Also, this proposal would create an inelegant organizational structure. IBCA could not be included due to its statutory independence and the requirement that IBCA judges devote full-time to the resolution of contract dispute claims and have no duties inconsistent with deciding such claims. In addition, this proposal would increase layering and exacerbate competition between the subordinate boards for priority treatment by the Appellate Division Chief Judge.

Id.

G. Conclusions and Recommendations

It is difficult to formulate a single review system and to apply that system to all agencies. Agencies have differing programs with differing needs.[447] Nevertheless, certain broad conclusions can be made about the desirability of various systems.

In general, agencies should limit the extent to which high-level political appointees are involved in the review process. As previously noted, significant problems result from political review and such review is generally impractical. Agencies decide too many cases for the agency head to be actively involved in the review process. Moreover, such review has definite drawbacks. By virtue of how the review is conducted, such review can undermine public confidence in the fairness and impartiality of agency decisions.

Political review of adjudicative decisions is appropriate when an agency's adjudications involve major policy questions, and the agency wishes to have high-level political appointees "bite" on those questions. But such political review should be accomplished on a discretionary basis. In other words, a review board should initially review the case, and the agency head should get involved only after such review is complete. The initial review sharpens the issues, and lets the political appointee focus on policy issues.

The second conclusion is that, to the extent that an agency has an intermediate appellate body, or a body of last resort, it is generally preferable for agencies to use the JO system because it is cheaper and arguably more efficient. Under the JO system, a single person is able to handle an agency's appeals. Review board systems require three to five members, all of whom are well paid. In addition, review boards require significant increases in support personnel. At present, when the federal budget is drowning in deficits, the additional expense associated with a review board cannot always be justified.

In some situations, agencies should use the review board system rather than the JO system. One situation is when an agency's cases are complex so that it is desirable to have the collegial interchange provided by a review board. Such interchange helps ensure quality of decisionmaking. The other situation is when the agency's caseload becomes too large for a single person to handle. An agency should first consider the possibility of appointing a second JO. But the appointment of a second JO can have drawbacks. When more than one person is involved in the review process, it is generally desirable to have those individuals collaborate with each other to ensure consistency of decision.

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[447] SSA's AC decides cases that are relatively repetitive so that the AC functions more like an assembly line. In order to make the assembly line work, SSA uses large numbers of AAJs supported by huge numbers of analysts. EPA and NRC cases are of an entirely different nature. In the final analysis, different agencies may need different systems.

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G. Conclusions and Recommendations

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